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HOLDING WOMEN'S PSYCHES HOSTAGE: AN INTERPRETIVE ANALOGY ON THE THOMAS/HILL HEARINGS

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She sat before the TV alone—intently staring at the screen—a half empty beer bottle clenched in one hand. Littered with the dirt of neglect, the apartment reflected her distraction of the past few days. It was Sunday evening and the Thomas/Hill hearings were coming to a close. Gripped by a morbid fascination, Betty had watched the entire proceeding. At times during the testimony—especially when the TV camera moved from Anita Hill's solitary face to the wall of impassive white male faces on the committee—Betty felt weak and short of breath. When Senators Hatch and Specter attacked Ms. Hill, Betty could not contain her anxiety. She paced her small apartment asking the empty room why no one defended Professor Hill, how this could happen to a respected professional and, if it could happen to Ms. Hill, what it meant for Betty. She felt the old familiar nausea again.

On the Sunday evening the Senate Judiciary Committee concluded its investigation into Anita Hill's sexual harassment allegations against Clarence Thomas, Betty felt despondent and trapped. She was a forty-five year old white woman who had spent most of her adult life living with and caring for her aged parents. But they had died within the past two years leaving Betty without companionship, marketable skills or resources. She had turned to her relationship with her male friend for comfort but Frank had proved psychologically and physically abusive. After ending her relationship with Frank, Betty felt more isolated and less confident than ever. In addition to Betty's social alienation, lack of confidence, minimal employment skills and middle age, she was overweight. Recognizing her apparent limitations Betty felt fortunate to have found employment at a plumbing supply store in the city.

She was not altogether fortunate however. In her job Betty was sexually harrassed. Upon her arrival in the mornings male employees characteristically greeted her with comments like, "Well, Betty's here—now the gang bang can begin." Throughout the day they openly and degradingly discussed her physical anatomy. A favorite was, "Hey, sweetie, how can a guy get it in past all that fat?" At the day's end the four male employees typically gathered in the central office where Betty worked. They jostled her around, asked if she "had any" lately, suggested their

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willingness to relieve her sexual frustrations and sometimes touched parts of her body. Betty frequently left work sick to her stomach—vomiting when she arrived at home.

Several times during the past year Betty had not been able to make herself get out of bed and go to work. She stayed at home—her head hidden beneath her pillow—escaping from life in sleep. Her employer complained of her absences. Fearful of provoking worse behavior from male employees and of losing her job, Betty said nothing of the harassment and promised to be more regular. A customer who overheard some of the sexually explicit comments directed at Betty expressed his outrage to her. The customer's validation finally gave Betty the courage to complain. Her employer responded by telling her that if she wanted any job working with "the guys" she would have to become more thick-skinned. As she had feared, when the male employees heard of Betty's complaint, their harassment intensified and they urged the employer to fire Betty. A week later he did.

When Betty filed for unemployment benefits her employer objected. He said he fired her because of excessive absences and she therefore was not entitled to unemployment benefits. When Betty went to see a legal aid lawyer he told her the employer was right. The lawyer did not ask the reason for Betty's absences and she was too embarrassed to tell a male attorney how she had been treated.

The hearing on Betty's right to unemployment benefits was scheduled for the Wednesday after the Sunday conclusion of the Thomas/Hill hearings. Before watching the hearings Betty had worked hard to overcome her embarrassment and had planned to tell the hearing officer the reason she had missed work, hoping he would understand. Instead, when the Thomas/Hill hearings ended, Betty turned off her television, deliberately took an overdose of sleeping pills, and died.

Too dramatic, too sensational, the reader may think. Yet it happened[1]—and my struggle to comprehend Betty's death and its larger meaning motivated me to write this essay. Hoping to find some clue, I began my search for understanding by listening to other women's responses to the hearings. Some women were angry with the Senate Judiciary Committee, the Senate and the Bush Administration for their insensitive and one-sided treatment of the parties and the issues. Over time some of these women remained angry, while the anger of others seemed to dissipate, replaced by a quiet withdrawal. Another group of women angrily insisted that Anita Hill had lied and had gotten what she deserved during the hearings. No man in Thomas's position, they insisted, would behave the way Professor Hill said Thomas behaved. They further expressed their horror at what Professor Hill had done to Thomas and his family. Other women emphatically insisted that even if Thomas had sexually harrassed Anita Hill she should have complained,

1. I have, of course, deliberately altered some facts of Betty's story to preserve her privacy and dignity. I have not, however, altered the essence of her personal struggle nor the reality of her reaction to the Thomas/Hill hearings.

quit her job or not followed Thomas to the EEOC. At the very least, since she had not come forward earlier, Professor Hill should have remained silent. My monitoring of women's diverse reactions thus initially did little to increase my understanding of Betty's behavior.

Yet as I puzzled over this diversity and sorted through my own reactions to the hearings I began to think that many of these different reactions, including Betty's, might have the same etiology. In this essay I argue that the unanticipated trauma women felt in the wake of the hearings explains many of their diverse responses. In developing this theme I analogize the trauma induced in women by the Senate Judiciary Committee's treatment of Anita Hill to the trauma experienced by prisoners of war (POWs) at the hands of their captors. I then explore how many women's reactions to the hearings are similar to POWs responses to their captivity. Throughout, I discuss the negative implications for the women's movement of these reactions.[2] I conclude with some preliminary thoughts on how to minimize the damage.

Before beginning I want to acknowledge that the perspective presented in this essay supports the negative side of the debate over the hearings' effect on the women's movement. While I recognize that the Senate Judiciary Committee's treatment of Anita Hill and insensitivity to women's concerns spurred some women to greater activism, I present this negative view because I am concerned that some members of the women's movement have persuaded themselves that the effects of the hearings mainly are positive.[3] While underestimating the damage done by the hearings may enable some to preserve their morale and continue working, it nevertheless diminishes the movement's ability to confront and dispel the disillusionment and hostility of many women who reacted differently. With the hope of contributing to the movement's ability to represent and integrate all women, this essay confronts the darker side of the hearings reflected in many women's responses.

I. WOMEN AS PRISONERS OF WAR

POWs experience devastating trauma that precipitates emotional and behavioral reactions bearing a striking resemblance to some women's reactions to the hearings. Thus, to develop the analogy between war prisoners' reactions to captivity and women's responses to the hearings it is necessary to first explore the similarities between the trauma suffered by POWs and the trauma inflicted upon women by the Senate Judiciary Committee during the hearings. Certainly most women never experience the physical and psychological torture and the extreme deprivation of necessities like food, shelter, and medical attention that cap-

2. For purposes of this essay I perceive the women's movement as comprised of individuals who openly call themselves feminists and actively engage in promoting women's equality to men in the family and throughout society.

3. Leaders in the women's movement talk of detecting an increase in women's activism as a result of the hearings, yet rarely or fleetingly mention women's disillusionment. *E.g.*, Nina Burleigh, *Now That It's Over: Winners and Losers in the Confirmation Process*, 78 A.B.A. J. 50, 53 (1992).

tors commonly inflict upon POWs.[4] Yet many women in this society do experience physical abuse, psychological terror,[5] and the deprivation of food, shelter and medical care that attends their ever-increasing poverty. For these women this essay's analogy draws tightly.

Acknowledging the above distinction does not negate other uncanny similarities between the causes of war captivity stress and the causes of women's trauma during the hearings.[6] This section thus explores these common causes: unexpected immersion in a hostile envi-

4. For instance, Korean Conflict POWs experienced sudden subjugation, arbitrary killings, forced marches, frequent relocations, extreme and continuous nutritional deprivation, death threats, physical torture, solitary confinement, disease with limited medical attention and mass indoctrination. Patricia B. Sutker et al., *Assessment of Longterm Psychosocial Sequelae Among POW Survivors of the Korean Conflict*, 54 J. PERSONALITY ASSESSMENT 170, 171 (1990). *See also* Bruno Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOC. PSYCHOL. 417 (1943)(describing experiences of Nazi concentration camp prisoners).

5. I. Lisa McCann et al., *Trauma and Victimization: A Model of Psychological Adaptation*, 16 COUNSELING PSYCHOLOGIST 531, 533-34 (1988). As McCann et al. note, assuming the current rape rate does not change, a 46 percent likelihood exists that an American woman will experience attempted or completed rape in her lifetime. Approximately one-third of all women experience sexual abuse in childhood and projected statistics suggest that up to 1.8 million wives suffer physical abuse each year. Consequently, while many women's lives do not capture the full range or intensity of the abuse endured by POWs, parallel experiences do exist for many women.

6. I confess I have chosen in this essay to develop the more dramatic of two possible analogies: prisoner of war or posttraumatic stress disorder (PTSD). I have done so to maximize the power of imaging. Moreover, PTSD explains reactions to traumatic events that have ended. I chose the POW reaction to captivity to explain women's reactions to the Thomas/Hill hearings because, while traumatizing in themselves, I think the hearings made clear the continued captivity, rather than the repatriation, of women. For those who find my textual analogy stretches too far however I offer this footnote.

Rather than use POWs' reactions to their captivity experience to explain women's diverse responses to the hearing, I easily could have employed PTSD. *The American Psychiatric Association's 1980 Diagnostic and Statistical Manual of Mental Disorders* (DSM III) describes PTSD as a group of symptoms that occur in response to an unusual traumatic event that would normally cause significant distress. McCann et al., *supra* note 5, at 536. The DSM-III's list of specific symptoms however has evoked criticism as too restrictive because they focus more on reexperiencing the trauma rather than denial. *Id.* at 531.

Moreover while interest in understanding the behaviors of repatriated POW originally encouraged research on and official recognition of PTSD, the disorder is now acknowledged as a common response to a large variety of life stressors: observation of another person experiencing a seriously threatening event, Philip A. Saigh, *The Development of Posttraumatic Stress Disorder Following Four Different Types of Traumatization*, 29 BEHAV. RES. THERAPY 213, 213 (1991); death of a loved one, John P. Wilson et al., *A Comparative Analysis of Post-Traumatic Stress Syndrome Among Individuals Exposed to Different Stressor Events*, 11 J. SOC. & SOC. WELFARE 793, 793 (1984); personal injury, J. Krupnick & M. Horowitz, *Stress Response Syndromes: Recurrent Themes*, 38 ARCHIVES GEN. PSYCHIATRY 428 (1981); rape, Frances K. Marton, *Defenses: Invincible and Vincible*, 16 CLINICAL SOC. WORK J. 143 (1988); Edna B. Foa et al., *Processing of Threat-Related Information in Rape Victims*, 100 J. ABNORMAL PSYCHOL. 156 (1991); divorce, Wilson et al., *supra*, at 808; a natural disaster, Peter Steinglass & Ellen Gerrity, *Natural Disasters and Post-traumatic Stress Disorder: Short-Term versus Longterm Recovery in Two Disaster-Affected Communities*, 20 J. APPLIED SOC. PSYCHOL. 1746 (1990); work-related injuries, Billie Zeller Lawson, *Work-Related Post-Traumatic Stress Reactions: The Hidden Dimension*, 12 HEALTH & SOC. WORK 250 (1987); wife battering, *e.g.*, Mary Romero, *A Comparison Between Strategies Used on Prisoners of War and Battered Wives*, 13 SEX ROLES 537 (1985); and war captivity, John F. Russell, *The Captivity Experience and Its Psychological Consequences*, 14 PSYCHIATRIC ANNALS 250, 251 (1984); Robert Joseph Ursano & James Ray Rundell, *The Prisoner of War*, 155 MIL. MED. 176 (1990). In essence, an individual may experience PTSD as a result of any traumatic incident that erodes her faith in the world's safety and in her own invulnerability. Lawson, *supra*, at 252. PTSD also seems a more likely response when

ronment, unanticipated loss of status and support systems, and indoctrination.

A. *Experiences Common to POWs and Women*

1. Unexpected Immersion in a Hostile Environment

One of the first and most intense stressors encountered by POWs is the destruction of their innate sense of invulnerability that occurs when they unexpectedly confront a hostile environment.[7] Understanding how the hearings similarly encouraged women to confront their previously unacknowledged vulnerability requires deciphering the surprisingly hostile messages broadcast to women by the Senate Judiciary Committee, the Senate and the Bush Administration.

During the hearings, Betty and other women throughout the United States watched as Republican committeemen attacked Anita Hill and Democratic committeemen failed to defend her.[8] Moreover during the proceedings women heard that the Bush Administration and the Republican party had mobilized their considerable resources to uncover

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the traumatized person suffers injury or betrayal by other human beings, especially those she trusted. *Id.*

The symptoms of PTSD closely parallel the POWs' reactions to their captivity the essay discusses—loss of self (destruction of one's sense of invulnerability and loss of status), *e.g.*, Wilson et al., *supra*, at 796 (depending on one's psychosocial development, a stressor event can precipitate identity diffusion); Marton, *supra*, at 145-46, 151 (loss of sense of invulnerability can result in a traumatic neurosis); shock, *e.g.*, *id.*, at 146 (panic can result when the ego is overwhelmed by a threatening danger); denial (avoidance), *e.g.*, Foa et al., *supra* (providing a cognitive explanation of denial); Marton, *supra*, at 144, 152; Steinglass & Gerrity, *supra*, at 1752-53, Wilson et al., *supra*, at 799; apathy (passive compliance), *e.g.*, Marton, *supra*, at 151 (noting the sense of hopelessness that develops in a rape victim who can no longer count on protecting herself); Zahava Solomon et al., *Negative Life Events, Coping Responses, and Combat-Related Psychopathology: A Prospective Study*, 97 J. ABNORMAL PSYCHOL. 302, 306 (1988)(the higher the level of PTSD in POWs the less likely they would engage in active problem solving behavior); Wilson et al., *supra*, at 798-99 (helplessness develops when one experiences a loss of control); displaced anger, Solomon et al., *supra*, at 312 (suggesting that veterans with PTSD express anger and hostility towards others in order to avoid accepting personal responsibility for their postwar maladjustment); identification with those causing the trauma (identification with captors), Susan Lee Painter & Don Dutton, *Patterns of Emotional Bonding in Battered Women: Traumatic Bonding*, INT'L J. WOMEN'S STUD. 363, 364-65 (1985) (comparing the bonding of captives with their captors to the bonding of battered women with their batterers); self-destructive behaviors, Marton, *supra*, at 145 (rape victims may blame themselves); *id.* at 152-53 (rape victims sometimes turn their rageful impulses against themselves); Zahava Solomon et al., *supra*, at 306 (the more severe the PTSD the greater the number of negative life events the victim experiences); and resistance (no symptoms of PTSD), Steinglass & Gerrity, *supra*, at 1759 (approximately only 15 to 20 percent of studied victims of natural disaster exhibited PTSD four months after the disaster). The finding that women experience PTSD more frequently than men, *id.* at 1760-61, also has relevance in this essay.

7. *E.g.*, Robert S. Andersen, *Operation Homecoming: Psychological Observations of Repatriated Vietnam Prisoners of War*, 38 PSYCHIATRY 65, 65-66 (1975); Richard H. Rahe & Ellen Genender, *Adaptation to and Recovery from Captivity Stress*, 148 MIL. MED. 577, 577-78 (1983).

8. F. Lee Bailey notes the vicious ineptness of Republican Senators Hatch and Specter and the passive incompetence of the Democratic Senators Biden, Heflin and Leahy. F. Lee Bailey, *Where Was the Crucible? The Cross-Examination that Wasn't*, 78 A.B.A. J. 46 (1992). The cross-examination by Republicans Specter and Hatch ultimately was as poor as the cross-examination by Democrats Biden, Heflin and Leahy in terms of discovering what happened between Hill and Thomas. Yet the Republicans' ineptness did not erase the messages sent by the Republicans' viciousness toward women and the Democrats' unwill-

whatever compromising information they could about Ms. Hill.[9]

> MESSAGE: Speaking against a (powerful) male provokes mobilization of male power against you—and you will face the attack alone.

Although the purported purpose of the hearings was to investigate the truthfulness of Anita Hill's allegations against Clarence Thomas, women witnessed the vicious distortion of Anita Hill's testimony by Senators concerned more with achieving their political objective than with discovering the truth.[10]

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ingness to defend. The tele-electronic images of attack and defenselessness remain indelibly etched on women's psyches.

I do not mean to imply that Anita Hill was totally defenseless. For many who watched the hearings her quiet dignity and strength of character were her ultimate defenses against the Senate Judiciary Committee's disgraceful behavior. As one commentator noted, "[b]ut Anita Hill also won: She maintained her dignity in the face of unimaginable pressure. The Republican smears were too ridiculous to affect her daily life or reputation." Joe Klein, *Joe Klein on the Clarence Thomas Follies: Tabloid Government*, NEW YORKER, Oct. 28, 1991, at 29, 31. While Professor Hill admirably defended herself, she had to withstand the Republican assault alone. In contrast Thomas received the Democrats' respectful deference and the Republicans' vehement support. Many victimized women lacking Anita Hill's strength and impeccable character would not fare as well against such odds, as the William Kennedy Smith rape trial graphically illustrated.

9. Before the hearings began *The New York Times* noted, "[t]he White House, for its part, is hunkered down, preparing to make a heavy assault against Professor Hill." Maureen Dowd, *The Thomas Nomination; Facing Issue of Harassment, Washington Slings the Mud*, N.Y. TIMES, Oct. 10, 1991, at A1. Despite the employment of such resources the Republican party and the Bush administration produced no credible evidence negatively implicating Anita Hill's character or stability. *See infra* note 26 discussing the Republican's ineffective attempt to prove Anita Hill's allegations resulted from her sexual fantasy about Thomas.

Thomas proponents also claim his character suffered unfair attack during the entire confirmation process by what President Bush affectionately called "special interest" groups. Burleigh, *supra* note 3, at 52. Whether or not one agrees with this perspective, the televised image of massive power mobilized against a solitary woman remains the same.

10. The most noteworthy example of this was Senator Specter's accusation that Professor Hill had committed perjury. As well stated by F. Lee Bailey:

> Specter sanctimoniously declared that Hill was a perjurer, calling upon his not very illustrious experience as a prosecutor to make that judgment. Had he had the temerity to hurl that accusation in Hill's face, she might have used what Thomas termed her 'willingness to fight' to destroy the senator with, a phrase used by Boston lawyer Joe Welch in the demise of Sen. Joe McCarthy: 'Have you no decency?' Had Specter made that gratuitous declaration anywhere but in the protective cocoon of a Senate chamber, many a lawyer would have offered to take up the cudgel for Hill and fry his rump in a jury skillet.
>
> No lawyer reading the record of these proceedings would even consider, on any objective basis, that a case of perjury could be made against Hill without some much more compelling evidence.

Bailey, *supra* note 8, at 48-49.

The Democrats as well had their objectives. Meaningfully exploring the propriety of Clarence Thomas's confirmation took a backseat to overcoming their embarrassment at initially having trivialized Anita Hill's allegations and to defending their staffs from Republican allegations of violation of the Senate rules of confidentiality. *See* Dowd, *supra* note 9 (suggesting the public's mystification at the Senate's greater focus on defending its rules than on defending either Thomas or Hill).

The current controversy regarding the "leak" and the race to find the culprit seems equally misdirected. Rather than search its soul and ask why it initially found Anita Hill's allegations insufficiently important to warrant in-depth review, why it failed to understand how those allegations spoke to Thomas's capacity to serve as a Supreme Court Justice, why Senators from both parties behaved so poorly during the hearings, how it violated wo-

MESSAGE: The very people given the responsibility to determine the truthfulness of your story against a man inevitably will distort your expression—your reality remains unacknowledged and unknown.

Our society's laws and rhetoric imply that men cannot treat women with whom they work in a sexually degrading and dehumanizing fashion. Thus when a woman complains of such behavior her concerns at least should be taken seriously. Yet the Senate Judiciary Committee trivialized Anita Hill's concerns by initially refusing to investigate thoroughly her allegations. The President of the United States followed suit by declaring his unwavering support for Clarence Thomas before even hearing Anita Hill's story.[11]

MESSAGE: You are not the first class citizen you thought you were—your legal rights are subject to male whim.

Contrary to what would be allowed in a formal trial of a sexual harassment claim, women watched as Senate Judiciary committeemen used factually unsupported inuendo and unchallenged biased nonexpert testimony[12] to impugn Professor Hill's character. Testimony that Clarence

men's faith, and ultimately whether it erred in confirming Clarence Thomas to the Supreme Court, the Senate instead diverts attention to procedural issues—hoping to encourage the public to ignore its substantive indiscretions. Moreover it seems curious that no one has suggested the staffer who leaked the information might have engaged in time-honored civil disobedience, rather than an easily discredited breach of the rules. Certainly information vital to an individual's capacity to serve as a Justice on the United States Supreme Court demands careful consideration. Perhaps social conscience rather than political expediency motivated the leak.

11. Before the Thomas/Hill hearings began, President Bush strongly supported his nominee: "I support him 100 percent, no fear of contradiction. I am strongly for him." Adam Clymer, *The Thomas Nomination: Conflict Emerges Over A 2nd Witness*, N.Y. TIMES, Oct. 11, 1991, at A1. Even former EEOC press secretary Angela Wright's statement that corroborated Anita Hill's allegations did not influence President Bush's support for Thomas. As The Washington Post noted just before the hearings began: "Judy Smith, a deputy White House press secretary, said last night that Wright's allegations have not caused the White House any second thoughts about Thomas: 'Absolutely not. Judge Thomas had and has our full support. At the end of this process, he will be confirmed.' " Ruth Marcus & Ann Devroy, *2nd Woman Tells Committee of Incidents With Thomas*, WASH. POST, Oct. 11, 1991, at A1.

Some speculated that Thomas's personal White House connections encouraged President Bush to ignore Anita Hill's allegations even before they became public. Ann Devroy, *White House Pins Hopes on Pledged Senate Votes: Benefit of Doubt is Sought for Thomas*, WASH. POST, Oct. 14, 1991, at A1. An alternative explanation however suggests the White House and Republican Senators simply exhibited an incredible insensitivity to women's issues and miscalculated their resulting political vulnerability. *See* Dowd, *supra* note 9 (political operatives indicated surprise at the White House and Republican Congressmen's unawareness of their political vulnerability because of women's anger).

12. For instance FED. R. EVID. 701 sets out the criteria for admission of opinion testimony by a lay witness. The rule requires opinions or inferences of a lay person to be rationally based on the witness's perceptions. During the hearings Thomas's women witnesses speculated, largely without challenge, that Professor Hill was: (1) a spurned lover; (2) a victim of fantasy; (3) a schizophrenic and (4) a liar, while simultaneously admitting that they never had heard Professor Hill speak of Thomas in anything but an admiring professional manner, that she had never shown signs of fantasy or any type of mental instability, and that she never had behaved in any unethical manner. Because their opin-

Thomas had not sexually harrassed other female coworkers, inadmissible at trial,[13] was introduced. Women also were left wondering what happened to relevant and admissible evidence against Thomas: the coworker who claimed Clarence Thomas had expressed himself in sexually inappropriate manners to her[14] and Thomas's Yale Law School class-

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ions lacked a perceptual base, Rule 701 would find them inadmissible. The United States Supreme Court reflects this consideration in Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67-68 (1986), where it recognizes the potential admissibility of fantasy evidence if the plaintiff has verbally expressed the fantasies.

Another of Thomas's witnesses, Mr. Doggett, testified on the basis of minimal contact with Ms. Hill that she had sexual fantasies about his interest in her. Instinctively recognizing the lack of rational connection between Mr. Doggett's perceptions and the requirements of Rule 701, Senator Biden could not contain himself, labeling Mr. Doggett's conclusions preposterous. *See infra* note 26 for more detailed discussion of the exchange between Senator Biden and Mr. Doggett.

The admissibility of the foregoing testimony also can be challenged under Rule 702 that requires qualification of the witness as an expert before she can comment on situations requiring specialized knowledge, such as delusional fantasies or schizophrenia.

13. FED. R. EVID. 404(b) precludes admission of prior bad acts to prove the character of a person in order to show action in conformity with the prior bad act. Likewise, Rule 404(b) prevents the admission of prior good acts to prove the character of a person and suggest conformity with the prior good acts in the present situation. To reason otherwise would allow a defendant accused of murder to attempt to prove he did not commit the crime at issue by having witnesses testify he had not killed them. Moreover Rule 404(a) generally bars character evidence offered to prove action in conformity with one's character on a particular occasion. Consequently the testimony of Thomas's women coworkers that Thomas had never sexually harassed them arguably lacked admissibility in the hearings addressing Anita Hill's accusations of sexual harassment. *But see infra* note 14 suggesting that Rule 404(b)'s exceptions to the inadmissibility of character evidence based on acts frequently provide creative counsel successful argument for admissibility.

14. The committee did enter into the record a transcript of an unsworn telephone interview with Angela Wright. During that interview Ms. Wright indicated Thomas pressured her to date him while she worked at the E.E.O.C. in 1984. Adam Clymer, *The Thomas Nomination; Parade of Witnesses Support Hill's Story, Thomas's Integrity*, N.Y. TIMES, Oct. 14, 1991, at A1. According to Ms. Wright, Thomas also commented on the size of her breasts and arrived unannounced one evening at her apartment; Ruth Marcus, *4 Testify Hill Spoke Years Ago of Harassment; Others Assert Her Picture of Thomas is False*, WASH. POST, Oct. 14, 1991, at A1. Ms. Wright decided to share her experiences with Thomas after watching Anita Hill's initial press conference. She explained, "I knew I felt from my experience with Clarence Thomas that he was quite capable of doing what she [Anita Hill] said." Clymer, *supra*. FED. R. EVID. 404(b) states that evidence of a prior bad act is inadmissible to prove the character of a person in order to show action in conformity with the prior bad act. Thomas's alleged behavior with Angela Wright is a prior act similar in kind to his alleged behavior with Anita Hill. Moreover, the alleged behavior with Angela Wright implicates Thomas's character and suggests his propensity to engage in the actions of which Ms. Hill accused him. Rule 404(b) thus seems to preclude Ms. Wright's testimony. However Angela Wright's testimony is not relevant solely to Thomas's character—it also tends to establish the existence of a hostile environment, a basis for a sexual harassment claim against an employer. Linda J. Krieger and Cindy Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115, 136-39 (1985). Rule 404(b) should not control its admissibility. Unsurprisingly many court decisions reflect the admissibility of such evidence. *E.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986); Henson v. City of Dundee, 682 F.2d 897, 911-12 & n.25 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 940 & n.3 (D.C. Cir. 1981).

Furthermore if Rule 404(b) were found to control the admissibility of Ms. Wright's testimony, the rule contains exceptions to the inadmissibility of character evidence. For instance, if Angela Wright's testimony were offered to prove Thomas's intent to sexually harass Anita Hill, the Rule should allow the testimony constrained only by Rule 403's concern with undue prejudice, *e.g.*, Kit Kinports, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: Evidence Engendered*, 1991 U. ILL. L. REV. 413, 440 n.157.

mate who acknowledged the nominee's long-standing appreciation of pornographic movies.[15]

> MESSAGE: You cannot know how to play the game because men create and alter the rules to advantage themselves— the playing field is never level—you cannot win—do not try.[16]

As Professor Kinports notes, attorneys generally succeed in fitting character evidence into one of Rule 404(b)'s exceptions and securing its admission. *Id.* at 426-27 & n.82 and 85.

Ms. Wright declined to label Thomas's behavior toward her sexual harassment. Rather she labeled it annoying and obnoxious, describing herself as very strong-willed and not easily intimidated. Clymer, *supra*. Irrespective of Ms. Wright's perception, however, her testimony corroborates that of Anita Hill. Although the press later released Ms. Wright's unsworn statements, women watching the hearings remained uninformed regarding Ms. Wright's potential corroborating testimony.

Moreover, although Senator Biden suggested the Committee spared Angela Wright the burden of testifying because of the late hour, *Transcript of Senate Judiciary Committee Hearing on the Supreme Court Nomination of Judge Clarence Thomas*, Oct. 13, 1991 (Lexis)[hereinafter *Transcript*] his explanation rings hollow because the threatening tone of the hearings invites an interpretation of her absence more consistent with that tone. Without knowing more, women could speculate that Angela Wright did not testify because she received overt or covert threats. Women also could surmise that Ms. Wright's character or past behavior could not withstand the unfair scrutiny to which Anita Hill's character and behavior was subjected. *See* Clymer, *supra* (committee aides indicated Democrats were uncertain of Ms. Wright's credibility); Marcus, *supra* (Thomas fired Ms. Wright allegedly for referring to homosexuals as "faggots"). Both these conclusions—that Angela failed to appear because of threats or potential exposure to unfair ridicule—deepen the perception of threat the hearings created in women.

15. *The New York Times* quoted Ms. Lovita Coleman, a former Yale Law School classmate and strong supporter of Thomas, as stating that during law school Clarence Thomas had often patronized x-rated movie houses, and had more than once humorously described an x-rated film to her and others. Lovita Coleman also said that neither she nor the other students were offended by Thomas's amusing comments. Michael Wines, *The Thomas Nomination: Stark Conflict Marks Accounts Given by Thomas and Professor*, N.Y. TIMES, Oct. 10, 1991, at B14.

An exchange between Senator Leahy and Mr. Kothe, the former Dean of Oral Roberts Law School, beautifully illustrates the relevance of this excluded information to the credibility of Clarence Thomas:

> SEN. LEAHY: And, Dean, you have testified the Clarence Thomas you knew could not possibly have made the statements Anita Hill claims he made. And I understand that you stated that very forcefully, sir. Do you believe that the Clarence Thomas you knew could enjoy talking about pornographic movies? I mean, that's one of the things that was alleged—Anita Hill alleged that he talked to her about pornographic movies. Are you saying that the Clarence Thomas you knew couldn't—wouldn't even enjoy talking about pornographic movies?
>
> MR. KOTHE: I can't believe it. I can't believe that this man would even think in terms of pornographic movies. All of my relationship with him was at such a high level, talking about books of religion and philosophy and things that he was reading. I can't imagine that this man would have any diversion in the area that you described. I just simply can't.

Transcript, *supra* note 14, Oct. 13, 1991. Senator Leahy then informed Mr. Kothe of Ms. Coleman's statement. Mr. Kothe admitted his surprise. *Id.*

16. At the beginning of the hearings Naomi Wolf noted that women's outrage sent the Senate Judiciary Committee scrambling to appear concerned. She suggested that if the committee also were to respond to Anita Hill's allegations with appropriate gravity, business as usual could not continue. If the Senate were to demean the seriousness of Anita Hill's charges, she argued, women would have been told that "20 years into the battle for a level playing field, they can play the game the boys' way or go home." Naomi Wolf, *Sex, Lies and Silence: Feminism and Intimidation of the Job: Have the Hearings Liberated the Movement?*, WASH. POST, Oct. 13, 1991, at C1. Because the Senate did not take the allegations seriously enough even to conduct a balanced, fact-finding hearing, Ms. Wolf's negative premonition seems correct. Women now know the playing field is not level and, because they

Betty and women across the country watched other women give painful and moving accounts of their own experiences of sexual harassment. Women heard as women explained their continued sense of vulnerability and shame that kept them silent.[17] Afterwards they listened as Senate Judiciary committeemen continued to express ignorance of and insensitivity to the reality and psychological dynamics of sexual harassment.

> MESSAGE: The powerful males who sit in judgment of you do not have and will resist acquiring sympathetic understanding of your reality—for them your reality is fiction.

As the hearings drew to a close Senate Judiciary committeemen took turns acknowledging the seriousness of sexual harassment and expressing their gratitude for the sensitization they had experienced. But women then heard those same relieved committeemen fondly recall their college years and their Playboy magazines.[18]

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unsuccessfully played the game the boys' way, they should go home and business as usual can continue.

17. According to her testimony Anita Hill remained silent because, "I wanted to stay in civil rights. I thought I had something to add." Other professionals like law professor Emma Coleman Jordan have advised, "keep silent or risk destroying the hard-won gains of years of education and rigorous training." Anita Hill's silence then hardly seems unusual.

Naomi Wolf explains:

> No woman should be judged for whatever decision leads her to keep silent. I've been hearing variations of such silence across America. It extends far beyond the tolerance of specific episodes of sexual harassment, and into many women's public disavowal of attitudes that could be construed by their employers as feminist. While traveling from state to state, to listen to audiences of ambitious, educated middle-class women explore why they often don't identify with the women's movement, I have begun to ask them about professional punishment for holding feminist beliefs.

It is at this point that heads begin to nod in affirmation. If I am interviewing women in an office building, it is also at this point that I'm drawn behind closed doors. They tell me their stories and ask not to be named. Wolf, *supra* note 16.

Susan Estrich, a law professor at the University of Southern California, stated that women who brought sexual harassment claims based on a hostile environment usually did so only if they quit the job or suffered dismissal. Karen DeWitt, *The Thomas Nomination; The Evolving Concept of Sexual Harassment*, N.Y. TIMES, Oct. 13, 1991, at A28. Thus if continuing relations seem important because they provide career recommendations, women seem disinclined to raise sexual harassment issues.

In a 1987 survey of federal workers by the United States Merit Systems Protection Board, 42% of the female federal workers indicated they experienced sexual harassment, whereas only 14% of men reported sexual harassment. Only five percent of all sexually harassed respondents however formally complained. Many believe women underreport sexual harassment because of the stigmatization they experience upon complaint. *Id.*

18. In an attempt to minimize the importance of Clarence Thomas's appreciation of pornographic movies during his law days, Senator Simpson stated the following:

> [I] want to tell you, if we all started to trot out what we did in law school, that ought to be a riot for the American public. I don't know what Clarence Thomas did in law school, but I've got a hunch about it. And I believe Playboy came out while I was in law school, and I remember reading it for its articles and its editorial content. (Laughter)

Transcript, supra note 14, Oct. 13, 1991. Mr. Stewart, one of Clarence Thomas's witnesses, did not appreciate Senator Simpson's humor and reminded the committee of the gravity of its task. *Id.* After Mr. Stewart's plea the Committee returned to the business of examining Mr. Doggett. However when given an opportunity to speak, Senator Hank Brown refused

> MESSAGE: These proceedings—in the end—have been only a joke to these men—despite your expressed pain—nothing has changed.

And, finally, at the conclusion of the hearings women heard committeemen call for a time of healing in the Senate.

> MESSAGE: After our public display of sensitivity to women's concerns we men shall close ranks—nothing can compromise our male solidarity.

Cumulatively these messages transmit the image of a male dominated society overtly hostile and covertly demeaning to women. Moreover they brutally expose women's vulnerability to male power. These messages shocked me and left me feeling vulnerable in a way I have not experienced since I was a young child chased by neighborhood bullies whose hatred I neither expected nor understood. Then, as during the hearings, I felt captive in a foreign culture—prisoner of a war I had not fully known existed. In the face of all the advances many women thought had been made during the past two decades, the Senate Judiciary Committee made certain women understand they exist subject to their male captors' approval. Male tolerance of women, the messages read, still demands women's good behavior—women's complicity, in essence, in their own oppression. I believe many other women felt the same traumatic vulnerability Betty and I did in response to the unexpected hostility toward women broadcasted throughout the hearings—a trauma closely paralleling that inflicted upon POWs.

2. Unexpected Loss of Status

In addition to their abrupt confrontation with a hostile environment, war captives experience a dramatically traumatizing transformation of their status as person to that of object[19] ultimately eroding the longterm captive's independent and integrated personality.[20] Analogously, when the Senate Judiciary Committee treated Anita Hill and the women testifying on her behalf as though their experiences did not occur or acknowledged the reality of their experiences while simultaneously denigrating its importance, it stripped women of identity and

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to be outdone by Senator Simpson. Senator Brown concluded his brief questioning of Mr. Doggett with:

> Mr. Chairman, I want to yield back, but if I could just make a note about the legal research that Senator Simpson did in law school. We had a student in Colorado's law school—I don't—it was not Yale, but it was Colorado—who did legal research, I understand, with Playboy, because he took certain pictures out of Playboy and appended them to his answer in torts. In two or three places, he received the highest grade in the class. I will yield back.

Id. The transcript indicates no additional laughter.

19. John F. Russell, *The Captivity Experience and Its Psychological Consequences*, 14 PSYCHIATRIC ANNALS 250, 251 (1984). *See also* Robert Joseph Ursano & James Ray Rundell, *The Prisoner of War*, 4 MIL. MED. 176 (1990).

20. Russell, *supra* note 19, at 251.

dignity—transforming them, in essence, from individuals into objects.[21] Upon bombardment with the Committee's objectifying messages some women who internally experienced themselves as persons waivered and suffered a diminished sense of status.[22] Others in this society listening to such messages also might comprehend and ultimately treat women as inferior.

Moreover, as Patricia Williams eloquently persuades, acknowledging legal rights for persons who have existed without them affirms the individual's internal sense of identity.[23] Women know they have a legal right to bring sexual harassment claims. Yet the way the Senate Judiciary Committee conducted the hearings suggested that any such right was a mere fiction. As noted earlier, inadmissible evidence was introduced[24] and highly probative material was excluded.[25] Witnesses with no expert knowledge were allowed to make psychological diagnoses even when no facts supported those diagnoses.[26] Senator Specter

21. Republican Senator Simpson exemplifies the inability or refusal of the Senate Judiciary Committee to hear the women who testified for Anita Hill. He continued to express his disbelief that a woman would not complain if subjected to Clarence Thomas's behaviors despite the testimony of women relating their own experiences of sexual harassment and their subsequent failure to come forward. The sexist jokes made by Senators Simpson and Brown at the end of the hearings provide yet another example of the Judiciary Committee's inability to comprehend the seriousness of the women's issues they allegedly addressed. *See Transcript, supra* note 14, Oct. 13, 1991.

22. Many women with whom I spoke during and after the hearings talked of feeling an identity loss as a result of the Senate Judiciary Committee treatment of Anita Hill. Because the men on the committee so obviously viewed women differently from the way these women viewed themselves, the women found themselves compelled to adjust their view of themselves as independent and powerful personalities—and as worthwhile persons. Some talked of feeling insecure in their professional environments, wondering anew what the men with whom they worked really thought of them. Others spoke of feeling more at the mercy of the men for whom they worked, vowing to be more careful in the future of what they said and did. As one female bartender I talked with stated, "Well, I have to say, I feel more like a piece of meat than I did before." For women with little sense of their independence and power the Thomas/Hill hearings would not have been traumatic—simply reinforcing.

23. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

24. *See supra* note 12.

25. *See supra* note 14 and accompanying text. The public was left wondering what happened to the other women who allegedly were going to testify about other instances of Thomas's inappropriate sexual behavior. Moreover, no one bothered to seek or introduce evidence of Thomas's prior or current practice of renting and discussing pornographic movies. This type of evidence had relevance to the credibility of both Anita Hill and Clarence Thomas.

26. A notable example of this occurred when Senator Specter attempted to establish Anita Hill's propensity for sexual fantasy through questioning Mr. Kothe and Mr. Doggett. In response to Senator Specter, Mr. Kothe read into the record a statement he had made on October 7, 1991. "I find the reference to the alleged sexual harassment not only unbelievable but preposterous. I am convinced that such is a product of fantasy." In his by then characteristically inept fashion, Senator Specter pursued Mr. Kothe who responded, "And the second statement I made in October 10—I left that off—that was a—that wasn't intended as words of art or scientific expression. It was just the instant reaction I had to this—awful event." Refusing to give up, Senator Specter posed another question, "Well, Professor Kothe, was there anything that you could point to in Professor Hill's conduct that would lead you in a—either an evidentiary or a feeling way to that conclusion of fantasy?" Mr. Kothe responded:

"No. I think perhaps my selection of words there was probably unfortunate. I've

twisted Anita Hill's testimony in order to make groundless charges of perjury against her.[27] Questioning of the principal actors was ineffective and unbalanced.[28] Senators grandstanded rather than probed for the facts. In essence the substantive issue—whether Clarence Thomas sexually harrassed Anita Hill—remained buried beneath a procedural trashheap, sending women the message that their legal rights and the portion of their identity reinforced by those rights remain ephemeral—not real.

To the extent women internalized these messages or realized that powerful actors in society see them as objects rather than individuals, the hearings did much to transform the status of women from person to object. Women's experience of the hearings thus again parallels that of POWs.

3. Loss of Important Support Systems

From the time of capture, POWs lose the social, physical and environmental supports upon which they previously relied.[29] Moreover POWs from Western countries usually expect law to protect their legal rights. When confronted in captivity with a system that fails to respect their personal freedoms they sometimes react with utter disbelief and disillusionment.[30] Similarly, from the time of the hearings women had to acknowledge that many of the societal supports upon which they counted did not exist. Men they had helped elect to an allegedly democratic Senate proved insensitive to their concerns. The hearings themselves failed to provide procedural justice.[31] And, ultimately, a highly

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never seen Anita Hill in a situation where she wasn't a decent person, a dignified person, a jovial person. I've never seen her in a situation where actually you would say she was fantasizing in that sense. I almost regret that I had used that in my first reaction."

Transcript, *supra* note 14, Oct. 13, 1991.

Giving up on Mr. Kothe, Senator Specter then unleashed his prosecutorial talents on Mr. Doggett. With Senator Specter's assistance Mr. Doggett established that he thought Anita Hill had difficulty dealing with men who rejected her, *id.*, because at a going away party for Ms. Hill she had approached him and stated she was disappointed in him for leading women on and letting them down. *Id.* Based on this contact, a chance meeting while he was out jogging, and a dinner date that fell through Mr. Doggett concluded Ms. Hill fantasized about his sexual interest in her. *Id.* In one of his rare moments of leadership, Senator Biden forcefully indicated he found Mr. Doggett's conclusions preposterous. In his examination of Mr. Doggett, Senator Biden established that no other communication whatsoever had occurred between Anita Hill and Mr. Doggett, that Mr. Doggett had no background in psychology, that Mr. Doggett knew of no other instance that would suggest Ms. Hill's propensity for fantasy, and that Ms. Hill had not raised her voice at the party when she allegedly claimed disappointment with Mr. Doggett. *Id.* Senator Biden ended his examination by stating he felt Mr. Doggett's conclusions about Anita Hill were "a true leap in faith or ego, one of the two." *Id.* In apparent agreement with Senator Biden, the audience laughed. Unfortunately Senator Simpson accused Senator Biden of playing to the audience and Senator Biden retreated. *Id.* *See supra* note 12.

27. *See infra* note 32 and accompanying text.

28. *See infra* note 33 and accompanying text.

29. Russell, *supra* note 19, at 251.

30. Rahe & Genender, *supra* note 7, at 578.

31. Senator Biden announced at their beginning that the hearings were not formal judicial proceedings. *Transcript*, *supra* note 14, Oct. 11, 1991. Yet many individuals lack the sophistication to determine how the hearings differed from court proceedings. Re-

suspect male was made a Justice on the nation's highest court,[32] suggesting a severe compromise of substantive as well as procedural justice. Many women, similar to POWs, sat in disbelief and shock as a system

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gardless of the forum, citizens of the United States expect any dispute resolution procedure to approximate procedural due process—a fair opportunity for both sides to present their case. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCHOL. 296 (1986); P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. PERSONALITY & SOC. PSYCHOL. 1148 (1987); Kwok Leung & E. Allan Lind, *Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences*, 50 J. PERSONALITY AND SOC. PSYCHOL. 1134 (1986). The Senate Judiciary Committee hearings violated that expectation, particularly for women.

32. The Thomas/Hill hearing pit the credibility of Professor Hill directly against that of Clarence Thomas: most agree one of them lied. Thomas's credibility seems highly suspect because he had obvious reasons to lie: (1) potential confirmation to the United States Supreme Court; (2) preservation of his professional reputation in order to continue serving as a federal appellate judge in the event the confirmation failed; (3) preservation of his marriage. Barbara Vobejda, *Who's Telling the Truth? Experts Say Answer May Never Be Known*, WASH. POST, Oct. 13, 1991, at A30 (in a courtroom Thomas would have faced questions about his motivation to lie because of the danger to his career, reputation, and relationships if Hill's allegations proved true); and (4) knowledge that his lying would go undetected because witnesses to his behavior did not exist. In contrast Professor Hill had nothing to gain and much to lose by coming forward and/or lying: (1) public ridicule; (2) diminished professional stature and opportunity; (3) loss of privacy; and (4) employment.

Moreover, Thomas seems far more prone to sexual fantasies than Professor Hill. Psychologists who work with divorcing people recognize that sexual behaviors intensify among separated people, *e.g.*, JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 32-33 (1980); JOY K. RICE & DAVID G. RICE, LIVING THROUGH DIVORCE: A DEVELOPMENTAL APPROACH TO DIVORCE THERAPY 121-126 (1986). Some of Thomas's alleged harrassing behavior took place during his separation from his wife.

Thomas also put his credibility into question during the initial confirmation proceedings by stating that he had never discussed Roe v. Wade, 410 U.S. 113 (1973), with anyone, *Executive Session: Nomination of Clarence Thomas, of Georgia, to be an Associate Justice of the Supreme Court of the United States*, 137 CONG. REC. S14451 at 14459—an impossibility for any person actively engaged in the legal profession. Klein notes," . . . the only memorable statement to emerge from the first Thomas hearings was the judge's incredible denial that he'd ever "debated" the Supreme Court's Roe v. Wade decision. 'I'd guess he wasn't quite telling the truth there,' Nebraska Senator Bob Kerrey would later deadpan, 'which raised some questions in my mind about his character.' " Klein, *supra* note 8, at 29.

Finally, Thomas showed himself subject to delusion by labeling the hearings a racial lynching. In so doing he ignored the "reality" that he himself requested the hearing, that committee members strongly advocated for him, that the Bush Administration steadfastly supported him, and that the woman accusing him of sexual harassment was also an African-American.

Thomas correctly perceived his confirmation as racially discriminatory—but not in the way he meant. Rather the Bush Administration and the United States Senate discriminated against African-Americans by appointing a black man to the United States Supreme Court whose moral character, independence from the administration, and intellect remains suspect to many Americans. The racist message implicit in Thomas's appointment is that a black of questionable morality and intellect is the best we can find for a United States Supreme Court Justice. Surely in this country fine African-American judges exist who command the respect of all and whose appointment to the Supreme Court would enhance rather than diminish the status of Africans-Americans. In his open letter to Clarence Thomas, Judge Higginbotham eloquently expresses the agony felt by some African-Americans in the wake of the Thomas appointment. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992). *See also* Tom Shales, *At The Senate Hearings, More of the Mortifying Spectacle*, WASH. POST, Oct. 14, 1991, at D1 (Roger Wilkins, a longtime civil rights activist and history professor, expressed his anger at Thomas's use of the term "lynching").

they had counted on to operate representatively and fairly evaporated before their eyes.[33] Because the system that failed was their own rather than a foreign country's, one legitimately can speculate that their disillusionment proved extreme.[34]

Moreover many women had come to expect some degree of understanding from men on women's issues. Fellow travelers—be they men or women—could be counted on for empathy and support. Yet the very members of the Senate Judiciary Committee who claimed their dedication to liberal or women's issues in the end proved ineffective champions.[35] The passiveness of these allegedly supportive males in the face of Republican attack made male support generally suspect.[36] Thus the hearings strongly suggested to women the support systems they had counted on did not exist and, like POWs, these women experienced the stress associated with that loss.[37]

4. Indoctrination

POWs frequently find themselves punished by their captors for maintaining their own country's social and cultural values. Simultane-

33. *See* Wolf, *supra* note 16. (noting that the Thomas/Hill hearings illustrated the political system's failure to work for women). *See also* Tom Shanes, *At The Senate Hearings, More of the Mortifying Spectacle*, WASH. POST, at D1, Oct. 14, 1991 (suggesting that a combination of ineptness and fear of being labeled racist disabled the Democrats and labeling the Senate's initial bungling response to Anita Hill's allegation as as a betrayal of women).

Many men were also disillusioned by the way the Senate Judiciary Committee conducted the hearings. Their dissatisfaction seemed related to the the ineptness of the Senate Judiciary Commitee members and the basic unfairness of the hearings.

34. In the haunting words of a Vietnam prisoner of war who was reacting to repatriation:

> However, if a "friendly" system lets you down, is oppressive, or keeps you in a state of uncertainty, it is more devastating to you and makes you cynical of *any* environment, of anyone else. . . . You soon sense how far away you have been from a world you once took for granted.

Russell, *supra* note 19, at 253.

Not all women of course appreciate the procedural travesty the hearings represented. They might well think courts of law operate in this unfair and untrustworthy fashion. To the extent women now perceive courts this way, the hearings should prove a significant deterrent to their willingness to bring sexual harassment lawsuits. *The Wall Street Journal* recently reported a rise in sexual harassment claims within organizations but noted there was no corresponding increase in lawsuits. WALL ST. J., Feb. 25, 1992, at A1.

35. Senator Biden, for instance, proved extremely deferential to unethical Republican behavior, failed to control Republican abuse of process, seemed concerned primarily with protecting his reputation as Chairperson of the committee, and ultimately conceded that Clarence Thomas should have the benefit of the doubt in the event of ambiguity. Ruth Marcus, *Thomas, Allies Step Up Counterattack*, WASH. POST, Oct. 13, 1991, at A1. Senator Edward Kennedy, a recognized liberal, probably feeling constrained by his prior indiscretions with women, did not use his rhetorical skill to champion Anita Hill's cause. Dowd, *supra* note 9 (implying that Senator Kennedy's improprieties with alcohol and women led to his low profile before the hearings).

36. Many of my female friends and acquaintances have expressed their increased reluctance to trust men on any issue after the Thomas/Hill hearings.

37. One significant stress for Chinese and North Korean prisoners of war was the sequential experience of severe threat-followed by captors' promises of safety-followed by captors' arbitrary reintroduction of severe threat. Harvey B. Strassman et al., *A Prisoner of War Syndrome: Apathy as a Reaction to Severe Stress*, 112 AM. J. PSYCHIATRY 998, 998 (1956). Women should experience a similar trauma when confronted with threats from men interspersed with promises of support.

ously captors subject POWs to intense indoctrination and reward POWs when they accept the captor's ideology.[38] For instance, Chinese and North Korean POWs found that acceptance of the communist ideology or participation in collaborative activities earned increases in food, physical comforts and privileges, as well as promises of early repatriation.[39]

Similarly the hearings indicate that women who deviate from patriarchal ideology are vulnerable to male power. Certainly Professor Hill, as an unmarried high status professional, deviates from the traditional patriarchal script for women. Moreover she dared to challenge a powerful man. For these acts of defiance she suffered attack. The messages of the hearings thus nicely reinforce the current ideological campaign to encourage women to return to their proper social position[40]—subordinate to men.

Contrasting the hearings with the Tyson rape trial makes the message clearer. Tyson's successful antagonist, Desiree Washington, seemed to have an impeccable moral character similar to Anita Hill's. However, rather than defying patriarchal values, she fulfilled the acceptable script of beauty queen that, in turn, encourages the perception of women as sexual objects for men's pleasure.[41] Whereas Anita Hill, the nonconforming antagonist suffered attack and defeat, the conformer met with success—Mike Tyson was convicted of rape.[42] I do not mean to belittle Ms. Washington's courage or leave unacknowledged her challenge to patriarchy by bringing charges against a powerful male. Yet both Ms. Hill and Ms. Washington accused successful men, leaving them approximately equal on that score.[43] Safety for women, the message still reads, depends upon the extent of their compliance with patriarchal ideology[44]—just as safety for POWs frequently meant acceptance of

38. *E.g.*, *id.*; Sutker et al., *supra* note 3, at 171.

39. Strassman et al., *supra* note 37.

40. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991). In her book Faludi painstakingly sets out the campaign against American women found in the media, *id.* at 75-111; movies, *id.* at 112-39; television, *id.* at 140-68; fashion, *id.* at 169-226; politics, *id* at 229-80; popular psychology, *id.* at 335-62; law, *id.* at 423-30; and writings of revisionist feminists, *id.* at 312-32.

41. Both Anita Hill and Desiree Washington were unmarried. However in contrast to Anita Hill's maturity, Desiree was only nineteen years old—too young for people to believe she deliberately decided to defy patriarchal values by remaining unmarried.

42. The juxtaposition in the text ignores the obvious differences between Clarence Thomas, the federal court judge, and Mike Tyson, the boxer, that also influenced the different outcomes. The dissimilarity between Thomas and Tyson dilutes but does not negate the message that greater safety for women accompanies acquiescence to patriarchal ideology.

Moreover, despite her more traditional life expression, Desiree Washington was not entirely safe. She and Anita Hill both met with hostility from African-Americans who felt they had broken faith with their race by accusing high-profile African-American men of wrongdoing. *Victim Offered '$1 Million to Recant'*, DENV. POST, Feb. 21, 1992, at 2A.

43. Arguably Anita Hill's charges against a Supreme Court nominee threaten patriarchy more than Desiree Washinton's charges against a boxing champion. A Supreme Court Justice still seems more important to the preservation of male supremacy than a violent athlete—although recent appointments give me pause.

44. This statement is consistent with research indicating that observers tend to blame rape victims more when the victims deviate from traditional sex role norms than when they comply. Alan C. Acock & Nancy K. Ireland, *Attribution of Blame in Rape Cases: The Impact of*

their captors' values.

B. *Reactions to Captivity*

The above sections argue that the captivity experience of POWs bears an uncanny similarity, in kind though not degree, to what many women confronted during the hearings. One might expect then their reactions to the hearings to parallel the reactions of POWs to their imprisonment. For many POWs the traumatic stress of captivity causes common symptoms. This section explores these symptoms, how they reflect the responses of Betty and many other women to the hearings, and what these responses mean to the women's movement's viability.

1. Passive Compliance

As explained above, the unanticipated loss of status and support, as well as immersion in a hostile environment, destroy the prisoner's prior sense of invulnerability[45] and generate fear.[46] The prisoner's immediate reaction is fight or flight.[47] For most prisoners however fight and

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Norm Violation, Gender, and Sex-Role Attitude, 9 SEX ROLES 179, 187 (1983); Barbara Krahe, *Victim and Observer Characteristics as Determinants of Responsibility Attributions to Victims of Rape*, 18 J. APPLIED SOC. PSYCHOL. 50, 51 (1988).

45. *See infra* notes 19 and 20 and accompanying text.

46. Russell explains:

> The prisoner, in many ways, reverts to the child who relies on others to control his life. The captors are seen as totally omnipotent. However, unlike the child-parent relationship, the controller is not the caring, loving authority, but rather is someone aggressive, punitive and unpredictable, even at times malicious. At best the controller is seen as unconcerned about the welfare or survival of the captive. Fear develops.

Russell, *supra* note 19, at 252. *See also* Rahe & Genender, *supra* note 7, at 578. The tendency for POWs to regress to childlike responses seems universal. *See, e.g.*, Bettelheim, *supra* note 4, at 435-37, 444-47.

Regression sometimes is encouraged by the prisoners themselves. Bettelheim comments on this phenomenon in the context of Nazi concentration camps:

> [T]his regression would not have taken place if it had not happened in all prisoners. Moreover . . . [the prisoners] asserted their power as a group over those prisoners who objected to deviations from normal adult behavior. They accused those who would not develop a childlike dependency on the guards as threatening the security of the group, an accusation which was not without foundation, since the Gestapo always punished the group for the misbehavior of individual members.

Id. at 444.

47. Russell, *supra* note 19, at 251. In addition to the panic reaction noted in the text, POWs frequently respond to their initial captivity with denial. *E.g.*, Bettelheim, *supra* note 4, at 427, 431; Ursano & Rundell, *supra* note 6, at 177. Kitahara explains that the Japanese exhibited denial at their surrender and occupation after World War II similar to the denial found in newly arrived prisoners. Many Japanese did not believe the news of capitulation, or if they accepted the news, they distorted the contents to make it less painful. Michio Kitahara, *The Nazi Concentration Camp and Occupied Japan: Responses in Two Historical Situations*, 16 J. PSYCHOHISTORY 191, 194 (1988). Many women watching the hearings also may have responded to their initial perceptions of captivity by denying that status or by convincing themselves the situation was not as bad as first thought.

Among most prisoners, however, denial proves shortlived. Ultimately they confront and adapt to their captivity, or they, as Betty did, commit suicide. *E.g.*, Bettelheim, *supra* note 4, at 425-27; Kitahara, *supra*, at 194-95. One might expect then the short duration of women's denial and their eventual willingness to adapt to their captivity through passive compliance and other mechanisms developed in the text.

flight prove impossible.[48] Their fatigue, depression and deep sense of vulnerability eventually promote their adaptation to captivity:[49] apathy and passive compliance results.[50] The compliant POW frequently chooses to minimize harassment by not challenging captors and by participating in mundane and safe, rather than meaningful but dangerous, activities. In essence, resignation to one's fate becomes the norm.[51]

Similarly, the unanticipated hostility of the messages broadcast during the hearings made clear women's vulnerability to male power and women's inability to control what happens to them. Like prisoners of war, women cannot escape their captivity in a hostile culture. Nor can they, as the hearings made evident, fight effectively against such odds.[52] One might then expect their reaction to parallel that of the POW: passive compliance and reluctance or refusal to challenge their captors, especially on dangerous women's issues.

I believe this response is reflected in those women who initially re-

48. The circumstances surrounding imprisonment and the prior experiences of the captives also effect the prisoner's initial reaction to captivity. For instance, Bettelheim's observations made in Nazi concentration camps revealed that the group least able to withstand the initial shock of and comprehend their imprisonment were nonpolitical middle-class prisoners. He explained:

> They had no consistent philosophy which would protect their integrity as human beings, which would give them the force to make a stand against the Nazis. They had obeyed the law handed down by the ruling classes, without ever questioning its wisdom. And now this law, or at least the law-enforcing agencies, turned against them, who always had been its staunchest supporters. Even now they did not dare to oppose the ruling group, although such opposition might have provided them with self-respect. They could not question the wisdom of law and of the police, so they accepted the behavior of the Gestapo as just. What was wrong was that *they* were made objects of a persecution which itself *must* be right, since it was carried out by the authorities. The only way out of this particular dilemma was to be convinced that it must be a "mistake." These prisoners continued to behave in this way despite the fact that the Gestapo, as well as most of their fellow prisoners, derided them for it.

Bettelheim, *supra* note 4, at 426. To the extent that an analogy exists between the initial shock of imprisonment in a Nazi concentration camp and women's shock at confronting their imprisonment within our hostile society, one might expect women who steadfastly have followed the cultural script laid down for them to have the most difficulty accepting the negative implications for women of the Thomas/Hill hearings.

In time, confronted with daily brutalities, the nonpolitical middle-class prisoners that Bettelheim observed came to accept their actual situation. Bettelheim, *supra* note 4, at 427. Women however who have steadfastly followed their cultural script usually are not subjected to the same obvious terrors experienced by the concentration camp prisoners. They may never acknowledge their imprisonment in a hostile culture.

49. Russell, *supra* note 19, at 252.

50. *E.g., id.*; Strassman et al., *supra* note 37, at 999 (1956); Ursano & Rundell, *supra* note 6, at 177; Robert J. Ursano et al., *Coping and Recovery Styles in the Vietnam Era Prisoner of War*, 174 J. NERVOUS & MENTAL DISEASE 707, 708 (1986).

51. *See, e.g.*, Russell, *supra* note 19, at 252; Strassman et al., *supra* note 37, at 999; Ursano & Rundell, *supra* note 6, at 177.

52. One of the most distressing aspects of the Thomas/Hill hearings was the inability of women to protect a woman who already possessed power based on her income, education, prestigious occupation and impeccable character. If the full support of the feminist community proved ineffective in protecting a woman with Anita Hill's positive attributes from an egregious use of male power, clearly the women's movement can do little to protect less powerful women from similar—or worse—abuse. This is not to say that the women's movement should possess the sole responsibility for protecting women from male abuse.

sponded passionately to the hearings but whose startled disbelief and anger eventually changed to withdrawn acceptance and unwillingness to discuss further what had occurred. Unless their response is acknowledged and addressed one can expect their political activism as well as their willingness to identify with the women's movement, to decrease rather than increase in the wake of the hearings.

2. Displaced Anger

Because POWs cannot express their rage against their captors safely they sometimes unconsciously displace their anger onto safer targets.[53] Similarly, women, angered by their vulnerability to male oppression highlighted during the hearings, may have recognized the danger of directing their outrage against their male captors. Rather, like POWs, some women unconsciously displaced that anger onto a safer target—Anita Hill, the individual providing women striking evidence of their threatening vulnerability.

Moreover women who have complained of sexual harassment and suffered retaliation or who have left their jobs to escape harassment might resent Anita Hill's delay in complaining against Thomas. Why should Ms. Hill, they might wonder, be able to avoid the costs they experienced simply by delaying her complaint until long after her job ended?[54] Projection of this anger against Anita Hill however ignores the true culpit: a system that provided these women no protection against retaliation or required resignation to avoid sexual harassment. Displaced, rather than deserved, anger thus might explain the hostility many women exhibited toward Anita Hill after the hearings.

Women's displaced anger decreases the women's movement's effectiveness. If women recognized the actual source of their anger they could meaningfully direct their efforts for change. For instance, those women angry at Anita Hill for failing to bring a harassment charge sooner and escaping the costs they experienced could be instrumental in changing women's oppressive workplace reality if they redirected their energy toward reforming the system that permitted sexual harassment and then provided women no protection from retaliation or no choice but to resign their jobs. Displacing their anger onto Anita Hill in contrast inhibits women's ability to detect the source of their discomfort and

53. Russell, *supra* note 19, at 253 (citing S. Wolf & H.S. Ripley, *Reactions Among Allied Prisoners of War Subjected to Three Years of Imprisonment and Torture by the Japanese*, 104 AM. J. PSYCHIATRY 180 (1947)).

54. This anger likely is exacerbated by the class difference between Professor Hill and most of these women. With less power and resources at their command (few were Yale Law School graduates) they had the courage to complain. If they faced risks to defend their dignity in the workplace, why should Professor Hill, who possessed power few of them could imagine, be allowed to avoid coming forward without suffering blame. This thinking unfortunately ignores Anita Hill's vulnerability while working for the head of the government agency responsible for eliminating the very behavior in which he allegedly engaged. At that time in history, who would have believed her? Even now her story seems incredible to many.

correspondingly cripples their ability to make meaningful changes in their oppressive reality.

Moreover, to the extent women with displaced anger perceive Anita Hill as associated with the women's movement,[55] one can predict their increased disaffection with the movement. They might be more difficult than ever to convince that the movement's goals reflect their best interests.[56] Setting aside flowover anger from Anita Hill, the women's movement itself probably attracted some women's hostility during the hearings. Leaders of the movement often have urged women to stand up and be heard. Yet when Anita Hill, a powerful woman compared to most, did so, the movement failed to protect her from male attack. Women thus might feel betrayed by the movement and less willing to listen to exhortations to continue struggling for women's equality. Again a chilling analogy exists in the war captivity experience. In his study of Nazi concentration camps Bettelheim found that prisoners frequently expressed irrational hostility toward family and friends outside the camps who were trying desperately, yet ineffectively, to rescue them.[57]

Displacement however does not explain all women's anger with Anita Hill.[58] Commentators suggest that the anger of some African-American women stems from their belief that Anita Hill broke faith with

55. As one commentator noted, "[s]he [Anita Hill] has an enduring place in the Feminist Hall of Fame. Klein, *supra* note 8, at 29, 31.

56. As Faludi notes, the women's movement has suffered severe criticism for its alleged failure to recognize and work for the family interests allegedly exclusive to women. FALUDI, *supra* note 40, at 281-332. *See also* Scott Jaschik, *Philosophy Professor Portrays Her Feminist Colleagues as Out of Touch and 'Relentlessly Hostile to the Family'*, THE CHRON. OF HIGHER EDUC., Jan. 15, 1992, at A15 (noting how Clark University's philosophy professor Christina H. Sommers accuses elite feminist philosophers of shoddy work, insensitivity to most women's concerns, and hostility to the family, resulting in most women wanting nothing to do with feminism).

57. Bettelheim, *supra* note 4, at 439-43. Bettelheim lists several reasons for the prisoners' hostility toward their families: (1) inevitable changes in their families that thwarted prisoners' desire to return to the outside world as the same person who left, *id.* at 440; (2) concern that their families were not doing enough to free them, *id.* at 439; (3) their inevitable hostility that needed release, coupled with their inability to endure the addition hardship of blaming themselves for their captivity, *id.* at 441; and (4) their hatred of all those living on the outside who seemed to enjoy life in ignorance of the prisoners' plight, *id.* at 442. Over time the prisoners tended to cease directing their hostility towards those on the outside or the Gestapo. Instead they learned to direct aggression against themselves. *Id.* at 443.

58. In addition to the argument in the text, the discomfort some women felt at witnessing Anita Hill's courage might have precipitated their hostility toward her. Many women silently have endured experiences similar to Ms. Hill's. Anita Hill's courageous challenge of a powerful male is an inspiring example. Yet her behavior also implicitly suggests the deficiency of women who have silently accepted their plight. These women now must exhibit similar courage or face their own inadequacy. Anita Hill's behavior thus threatens these women's self-esteem and promotes their hostility toward her.

Professor Ehrenreich partially explains men's hostility to women in the workplace in a similar way. Women who refuse to accept the status quo and press for workplace reform challenge the complacency of male workers. Faced with assertive women role models, women heretofore considered inferior to men, the male workers see themselves as lacking in corresponding courage and ambition. This perception encourages their hostility toward women workers and their engagement in sexually harrassing behavior. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1227-28 (1990).

her race by accusing a successful black man of sexual impropieties. Black men have experienced a long and difficult history of racism in the United States, making their success contingent upon overcoming nearly insurmountable obstacles.[59] Black men also have proven vulnerable to injustice when accused of sexual crimes.[60] When the successful Judge Thomas recharacterized the hearings as a racial lynching,[61] he tapped these images of discrimination. He effectively implied that Anita Hill, by alleging sexual misconduct by a successful African-American man, was a traitor to her race.[62]

Thomas ignored much of history in making that implicit charge. Historically black men did suffer unjust lynchings when accused of sex crimes—but only sex crimes allegedly committed against white women. That the hearings addressed charges by a black woman against a black man became lost in Thomas's purportedly anti-racist rhetoric. The racial and sexual stereotype of Anita Hill as the promiscuous and lascivious black woman[63] also went unrecognized. Nevertheless the spectre of a racial lynching of a black man undoubtedly generated anger against Anita Hill in some black women. Protecting a prominent black man seemingly came more naturally than protecting a black woman.[64]

Certainly black women's hostility toward Anita Hill for breaking the racial faith poses problems for the women's movement. Although the racial issues in the hearings arguably should have promoted more protective instincts within the African-American community toward Anita Hill than Clarence Thomas, Thomas's anti-racist rhetoric struck a chord in many Blacks, whereas Anita Hill's femininst rhetoric did not. To the extent that Anita Hill personifies the women's movement, Ms. Hill's perceived breach of racial faith simply reinforces black women's preexisting suspicion that feminism fails to address minority women's unique concerns. If African-American women feel more alienated from the wo-

59. *See, e.g.*, Estelle B. Freedman, *The Manipulation of History at the Clarence Thomas Hearings*, THE CHRON. OF HIGHER EDUC., Jan. 8, 1992, at B2; Ellen Goodman, *Year of Male-Female Power Struggles: Undertone of the Champ and Woman Who Brought Him Down*, DES MOINES REG., Feb. 14, 1992, at 13A.

60. Freedman, *supra* note 59.

61. Deep irony exists in Clarence Thomas's invocation of the image of racial discrimination to protect himself. As Judge Higginbotham states in his open letter to Clarence Thomas, Thomas has criticized and refused to support the very civil rights advocates responsible for removing racially discriminatory barriers to Thomas's own professional and personal successes. Higginbotham, *supra* note 32, at 1014-15.

62. Goodman, *supra* note 59.

63. Professor Freedman notes:

> Viewing the Senate's response to Anita Hill in light of these historical precedents suggests that the predominant stereotypes influencing the outcome of the hearings were the stereotypes involving black women. Gender-specific racial myths placed Professor Hill in the tradition of the promiscuous, lascivious black woman. Furthermore, despite Ms. Hill's professional status, historical stereotypes of black women, still familiar to most white Americans, portray black women as either domestic servants or as welfare mothers.

Freedman, *supra* note 59. After identifying gender-specific stereotypes that worked against Anita Hill's credibility during the hearings, Professor Freedman asks, "[g]iven these stereotypes, just who was the 'uppity black' being punished in the Senate hearings?" *Id.*

64. *Id.*

men's movement as a result of the hearings, the movement has lost a powerful force.

3. Blaming the Victim

While the captivity experience may not cause the prisoner to blame himself for his plight, others may blame the victim. For instance Bettelheim notes that the German population generally proved unsympathetic to Germans who had family members in Nazi concentration camps. The German's strong need to trust that their world was governed by law and order led them to believe the prisoners must have committed outrageous crimes and thus deserved their fate.[65] Bettelheim's observation receives support from current research exploring how people sometimes blame the victim more than the perpetrator for the victim's misfortune.

Researchers explain the tendency to blame victims by citing people's need to protect themselves from psychic trauma and to perceive the world as just.[66] The Just World Theory posits that people struggle to retain their belief in a just world because to think otherwise implies a threatening lack of control over their environment.[67] The Defensive Attribution Hypothesis suggests that people attribute blame to the victim to avoid the suggestion that they themselves might be vulnerable to similar negative events.[68] Under this hypothesis, the greater the dissimilarity between the observer and victim, the more the observer tends to blame the victim.[69] Moreover the observer tends to search for differ-

65. Bettelheim, *supra* note 4, at 440-41.

66. *E.g.*, Judith A. Howard, *Societal Influences on Attribution: Blaming Some Victims More Than Others*, 47 J. PERSONALITY & SOC. PSYCHOL. 494, 495 (1984); Kevin D. McCaul et al., *Understanding Attributions of Victim Blame for Rape: Sex, Violence, and Foreseeability*, 20 J. APPLIED SOC. PSYCHOL. 1, 1-4 (1990); Bill Thornton, *Defensive Attribution of Responsibility: Evidence for an Arousal-Based Motivational Bias*, 46 J. PERSONALITY & SOC. PSYCHOL. 721, 721-22 (1984).

67. McCaul et al., *supra* note 66, at 3.

68. As Thornton explains:

> Moreover, these theorists claim that such undeserved victimization arouses a negative affective state in observers by threatening them with the prospect of similarly capricious misfortune occurring in their own lives just as unpredictably and uncontrollably. Thus, to maintain a sense of self-security, observers cognitively defend against the threat by distorting their perceptions of the victim's causal role in his or her own victimization. By determining that the individual was in some way responsible, the threat can be reduced and a sense of understanding and control over what would otherwise appear to be random, capricious events can be achieved.

Thornton, *supra* note 66, at 721.

69. McCaul et al., *supra* note 66, at 2. Thornton explains this phenomenon:

> Shaver further conceived of two distinct motives underlying defensive attribution: that people are motivated to defend cognitively against the threatening prospect of such unwarranted misfortune occurring to themselves; however, there is also a need to defend against the threatening possibility of being held personally responsible were they to succumb to a similar fate. Subsequently referred to as harm avoidance and blame avoidance motives, respectively, these two reactions are differentially aroused by the apparent similarity between observer and victim (e.g., attitudes, background, age, sex, etc.). Thus realizing situational similarity with a personally dissimilar victim, observers may defensively attribute personal responsibility to the victim in the interest of harm avoidance motives, acknowledging that they are personally different from or would behave differently than the victim and, consequently, could avoid a similar fate. Shaver proposed that

ences between herself and the victim in order to avoid acknowledging her similar vulnerability.[70]

Combining this research with Bettelheim's observations may explain why some women seemingly ignored Anita Hill's victimization and instead blamed her for failing to come forward earlier, for not quitting her job and/or for following Thomas to the EEOC.[71] They implicitly assume that had Anita Hill behaved differently she could have avoided victimization by Clarence Thomas. Thus the sexual harassment was Anita Hill's fault.[72] These defensive assertions allow women to continue believing their world is just—Anita Hill got what she deserved because she failed to act properly.[73] They also encourage women to ignore the hostile male culture in which they live and to avoid seeing that a truly just world does not contemplate sexual harassment or at least appropriately punishes such behavior when committed. Instead, as the hearings made evident, sexual harassment is commonplace, alleged perpetrators may receive promotions and victims who complain all too often suffer ridicule and blame.

Attributing Anita Hill's victimization to her own behavior also promotes a false sense of security in these women. They can assure themselves that had they been in Anita Hill's position they would have

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> when personal similarity to the victim cannot be denied, however, observers would not be inclined to assign blame to the victim because they would not want to be held similarly responsible had they caused or succumbed to similar consequences. Indeed, to derogate or blame a personally similar victim under such circumstances is presumed to be much like devaluing or blaming oneself. (citations omitted)

Thornton, *supra* note 66, at 721-22.

70. *Id.*

71. Acknowledging the pain and humiliation of others can create emotional discomfort in the empathizing person. As a result people sometimes deny the severity or reality of the victim's pain. Meerloo explains, for instance, how some psychiatrists' reluctance to address the true horror of Nazi prison camps caused them to underestimate the psychological damage done to the prisoners of those camps. Joost A.M. Meerloo, *Persecution Trauma and the Reconditioning of Emotional Life; A Brief History*, 125 AM. J. PSYCHIATRY 1187, 1187 (1969). Women's failure to acknowledge Anita Hill's victimization further protects them by preventing painful empathy.

72. Pryor notes a study by Jensen and Gutek that found more traditional women tended to blame themselves and other women more for incidents of sexual harassment, believing they should have done something to prevent it. John B. Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 SEX ROLES 273, 276 (1985) (citing I. Jensen & B. A. Gutek, *Attributions and Assignment of Responsibility for Sexual Harassment*, 38 J. SOC. ISSUES 121 (1982)).

73. These defensive attributions ignore that had Anita Hill complained sooner, quit her job or rejected the EEOC opportunity she probably could not have avoided victimization. Young black female professionals were vulnerable to racial and gender discrimination at the time Anita Hill allegedly experienced sexual harassment by Clarence Thomas. There was no assurance that Anita Hill could easily have replaced her job. These attributions also are blind to the immediate financial vulnerability of quitting one's job when one lacks resources upon which to fall back. Moreover, had Anita Hill not followed Clarence Thomas to the EEOC she would have foregone the very opportunity for which she had worked so hard. This too is a form of victimization—allowing the perpetrator's offensive behavior to deprive the victim of the professional opportunities she deserves. The attributions of blame also ignore the impossibility of a young female associate successfully accusing the head of EEOC of sexual harassment in 1981. Even now, in a different social climate and with Anita Hill possessing significantly more power and status, that task proved impossible.

complained, quit their job or rejected the EEOC opportunity. Since they would have behaved differently, the defensive thinking goes, they would not have experienced sexual harassment or abuse by the Senate Judiciary Committee.[74] Their perceived differences from Anita Hill obscure their vulnerability—they believe, in essence, they are safe.

While these defensive attributions may quell the psychic storm in women who witnessed the hearings, they threaten the women's movement. Women who perceive their worlds as just will lack motivation to work for reform. Moreover women who rely on artificial distinctions between themselves and Anita Hill to promote feelings of safety deny their vulnerability to the abuses of male power exhibited during the hearings. Their ignorance not only makes their individual victimization more likely, it also weakens the solidarity needed among women for the movement's ultimate success. To the extent then that women's responses to Anita Hill reflect defensiveness they bode darkly for the women's movement.

4. Identification with Captors

The adaptation to captivity for some POWs leads to identification with their captors.[75] The prisoner sees his captors as benevolent[76] and sometimes attempts to emulate their behaviors and attitudes.[77] Identification with those who hold them prisoner can become so complete the prisoner ultimately refuses repatriation.[78] In criminal incidents hos-

74. People attribute more blame to rape victims who participate in occupations that violate traditional female scripts. Krahe, *supra* note 44, at 51. Analogizing rape to sexual harassment, perhaps Anita Hill's vulnerability to victim-blaming stems partly from her professional position in legal academia where black female professors are rare. *See also* Acock & Ireland, *supra* note 44, at 187 (study found subjects blamed raped women more when the women violated sex-role norms than when they complied).

75. *E.g.*, Bettelheim, *supra* note 4, at 447-52; Kitahara, *supra* note 47 at 191; Russell, *supra* note 19, at 253. This phenomenon sometimes is referred to as the Stockholm Syndrome, named after an attempted robbery in Stockholm Sweden that resulted in a six day hostage incident. Russell, *supra* note 20, at 252. The bond the hostages formed with their criminal captors during their six days of captivity ultimately led them to condemn the police and defend their captors. Irka Kuleshnyk, *The Stockholm Syndrome: Toward an Understanding*, 10 SOC. ACTION & L. 37 (1984).

76. *E.g.*, Bettelheim, *supra* note 4, at 451; Russell, *supra* note 19, at 253.

77. Bettelheim describes this phenomenon in Nazi concentration camp prisoners. Longterm prisoners eventually mimicked the Gestapo's aggressive verbal expressions. When put in charge of other prisoners, they sometimes behaved worse than the Gestapo. Prisoners who had been there for some time also implicitly accepted Gestapo ideology by sometimes becoming instrumental in getting rid of "unfit" prisoners—those whose weaknesses posed dangers for other prisoners. Prisoners adopted the Gestapo model of slow torturous killings in dealing with traitors. The identification of many longterm prisoners was so complete they attempted to make their uniforms look like those of the Gestapo.

Even when Nazi goals and values conflicted with the prisoners' best interests they accepted them. Prisoners, however, denied they accepted Nazi values and explained their Nazi-like attitudes in terms of German nationalism. While noting the strong tendency for longterm prisoners to identify with their Nazi captors, Bettelheim also makes clear that these prisoners sometimes defied the Gestapo with extraordinary courage. Bettelheim, *supra* note 4, at 447-51.

78. In describing longterm prisoners in Nazi concentration camps, Bettelheim notes that they mainly concerned themselves with how to survive as well as possible within the camps. Abandoning their initial denial, the old prisoners experienced everything as real.

tages sometimes have hesitated to testify against those who detained them[79] and have visited their captors in jail two years after the incident.[80]

Kitahara provides a fascinating and instructive account of how, during the allied occupation after World War II, the Japanese came to identify with their captors. After overcoming their initial denial of their surrender, the Japanese tried to resist or trivialize the occupation.[81] In order to induce the Japanese to take the occupation seriously, General Douglas MacArthur communicated a strong authoritarian attitude toward them by emphasizing their subservient position, inequality with the allied powers and their inability to reject or negotiate allied orders.[82] MacArthur however combined this authoritarian attitude with paternalism, evidenced in his concern that the Japanese people have sufficient food and that they become civilized by learning democracy.[83]

When they reached this stage they became afraid of returning to the outside world, acknowledging their loss of original self and doubting their ability to adapt. Bettelheim, *id.* at 437-38. Bettelheim relates the following:

> The most drastic demonstration of this realization was provided by the case of a formerly very prominent radical German politician. He declared that according to his experience nobody could live in the camp longer than five years without changing his attitudes so radically that he no longer could be considered the same person he used to be. He asserted that he did not see any point in continuing to live once his real life consisted of being a prisoner in a concentration camp, that he could not endure developing those attitudes and behaviors he saw developing in all old prisoners. He therefore had decided to commit suicide on the sixth anniversary of his being brought into the camp. His fellow prisoners tried to watch him carefully on this day, but nevertheless he succeeded.

Id. at 439.

When Bettelheim questioned some of the old prisoners about their disinterest in talking about a future life outside the camp, they admitted to him they could no longer envision themselves living outside the camp. *Id.* at 439. Not surprisingly many prisoners of war experience high stress at repatriation. Ursano & Rundell, *supra* note 6, at 177.

Women who have experienced extended captivity in a hostile male culture might also experience a reluctance to accept freedom, distrusting their ability to adapt to a world that requires a new conceptualization of self and an acquisition of long forgotten or never-possessed skills. Particularly the reluctance of battered women to leave their captors might be understood more sympathetically from this perspective.

79. Kuleshnyk, *supra* note 75, at 38.

80. *Id.* at 40. The bonding that occurs between war or crime hostages and their captors parallels the traumatic bonding between beaten wives and their battering husbands. Painter & Dutton, *supra* note 6, at 364 (1985). *See also* Romero, *supra* note 6 (author argues that captors in both situations inflict psychological abuse in a violent context, create emotional dependency in the captive, isolate the captive from support systems and successfuly destroy the captive's self-identity). Painter and Dutton suggest that two factors explain the traumatic bonding of the battered woman to her abuser: (1) a power imbalance between the abuser and the abused in which the abused sees herself as subservient to the abuser, and (2) the intermittent nature of the abuse. Painter & Dutton, *supra*, at 365.

Rather than diminishing her credibility, Anita Hill's continued contact with Clarence Thomas after she left the EEOC seems entirely consistent with research on the Stockholm Syndrome and the traumatic bonding of abused spouses.

81. Kitahara, *supra* note 47, at 195.

82. Specifically, Kitahara suggests MacArthur communicated his authoritarian attitude by consistently reiterating that: (1) Japan is not equal to the allied powers, (2) Japan has no right to occupy a position among civilized nations, (3) Japan has been defeated, (4) no negotiations can occur between the Japanese and their captors, and (5) the allied Commander gives orders to the Japanese government—negotiation occurs only among equals. *Id.* at 195.

83. *Id.* at 195-96.

Stopping here for a moment, the messages sent to the Japanese during the allied occupation and the messages sent to women during the hearings seem strikingly similar. Like the Japanese, women at first disbelieved and resisted acknowledging their captivity by challenging the Senate Judiciary Committee's refusal to take Anita Hill's allegations seriously. The Committee seemingly deferred to women's interests by consenting to hold hearings on Ms. Hill's allegations.[84] Yet rather than consider the allegations seriously, during the hearings the Committee seized the opportunity to send an authoritarian message to women quite similar to the one MacArthur sent to the Japanese: You are not equal; we shall not listen to your grievances and negotiate with you; you have no choice but to obey our commands.[85] Moreover the Senate Judiciary Committee, like MacArthur, sometimes mixed its messages to women, momentarily abandoning authoritarianism when members either paternalistically expressed their purported horror at sexual harassment or treated women witnesses with paternalistic kindness.[86]

Kitahara argues the next step leading the Japanese to identify with their captors was demonstrating to the prisoners the decline in their emperor's power and the corresponding increase in MacArthur's power. The altered power positions became evident to the Japanese when the Japanese newspapers printed a picture of MacArthur and the Emperor together showing MacArthur relaxed and the Japanese Emperor rigid—accepting his inferior status. MacArthur emerged, in the eyes of the citizens, as the new Emperor of Japan.[87]

The hearings likewise brought the power of the women's movement into question. While women successfully forced the Senate Judiciary Committee to entertain Anita Hill's allegations, they could neither prevent the Republican attack on Anita Hill, nor block the nomination of Clarence Thomas. In contrast, the male Senate Judiciary Committee flexed its muscles throughout the hearings and made evident the relative powerlessness of women leaders. The closing snapshot of the hearings depicted men as conquering emperors and women as their captives.

Kitahara argues the final ingredient that predisposed the Japanese to identify with their allied captors was their perception of authority relationships as similar to parent-child relationships.[88] Because of this understanding, the Japanese expected their authoritarian conquerors to act as father figures, ultimately protective of their captives. In obliging

84. As Naomi Wolf indicates, women's outrage forced the men on Capitol Hill to take Anita Hill's allegations seriously. Wolf, *supra* note 16.

85. *See* text *supra* pp. 7-9 for the messages sent to women during the Thomas/Hill hearings.

86. While MacArthur's paternalism might have reflected a true desire to help the Japanese, the Senate Judiciary Committee's desire to help women deal with sexual harassment seems suspect when one considers the Senate's self-created immunity from sexual harassment charges. Ironically the new civil rights act removes that immunity: a move the Senate can well afford after informing women through the Thomas/Hill hearings what they can expect if they dare to file sexual harassment charges against one of the powerful brethren.

87. Kitahara, *supra* note 47, at 196.

88. *Id.* at 196-97.

childlike dependency, the Japanese sought to please MacArthur by moving toward democracy.[89] The patriarchal society in which American women live similarly predisposes women to identification with their male captors because it fosters women's expectations that men will provide for and protect them. The analogy thus becomes complete and women's perceived dependency encourages their identification with their captors.

Women who express their dismay at Anita Hill's destruction of Clarence Thomas's personal and professional life, who indicate unquestioning acceptance of Thomas's statements, who believe the Senate Judiciary Committee acted benevolently or who exhibit hostility toward Anita Hill, thus may do so because they identify with their captors. The negative ramifications for the women's movement seem apparent. Women who identify with their male captors will resist acknowledgment of their captive status and participation in a movement antagonistic to their captives' concerns. Rather they will perceive those who imprison them as benevolent and remain loyal for years after the event that triggered awareness of their captivity: the Thomas/Hill hearings. Their support for the women's movement seems unlikely. Bringing these women into the fold may prove especially difficult because devoted feminists may look unfavorably upon women who have sympathized with their male captors[90]—further discouraging these captives from joining the movement.

5. Self-Destructive Behaviors

When the reality of captivity can no longer be denied, some POWs commit suicide. The extreme stress created by their acknowledged helplessness and vulnerability as well as the disintegration of their individual integrity predisposes POWs to suicide.[91] Generally their inability to direct anger safely at those responsible for their plight encourages cap-

89. *Id.* at 197-98.

90. As noted by Kuleshnyk, those experiencing the Stockholm Syndrome may have difficulty upon release because their family, friends, public and the courts may look unfavorably upon a hostage who has come to be sympathetic with captors. Kuleshnyk, *supra* note 75, at 41.

91. When the Japanese could no longer deny that they had surrendered and that they faced occupation, those who could not face reality committed suicide. Kitahara, *supra* note 47, at 194. Similarly middle-class prisoners in Nazi concentration camps proved least able to withstand the reality of imprisonment as evidenced by their comparatively high suicide rate. Bettelheim, *supra* note 4, at 427.

This predisposition does not end at repatriation. As Russell notes:

> Data demonstrate that among the leading causes of death in former POWs are traumatic accidents, suicide, and homicide. That a person who, at one time and in many instances over a long period of time, had to use all his energy and determination just to survive would succumb to such behavioral trauma, carelessness, or disregard for life seems contradictory and presents evidence in and of itself of unresolved psychological conflict and psychiatric disorders. Keehn speculates that the high incidence of death from trauma could reflect failure of former POWs to resolve anxiety, the diminished sense of status, or the reduced sense of meaning or direction in life developed in the captive experience.

Russell, *supra* note 19, at 251.

tives to express their anger through self-destructive behavior.[92]

And here my search to understand Betty's extreme reaction to the hearings ends. Already traumatized by the loss of her parents, her male companion, and job,[93] the hearings that cast in bold relief her vulnerability and the hopelessness of appealing to a male judge proved too much. Rather than continue to endure the pain and degradation of her captivity, like a demoralized POW, Betty understandably chose to end her life. Though Betty's extreme reaction to the hearings is unusual among women, the feelings her behavior expressed, as I argue throughout, are not.

6. Resistance

The comparison of women to POWs however does not necessitate an entirely negative diagnosis for the women's movement. Many POWs resist their captors.[94] Similarly some women heard clearly the Committee's intimidating and demeaning messages implying that a life of captivity in subservience to men defines women's fate, but resisted—expressing outrage and greater commitment to political activism.[95] Yet if the analogy of women as war captives has validity, only certain types of women will resist strongly. Research on Vietnam POWs indicates that resisters tended to be older, higher in rank, held captive longer, more nonconforming and more extroverted.[96] Anticipating women with simi-

92. Bettelheim, for instance, notes that in order to avoid getting into trouble with the Gestapo, prisoners who spent extended time in Nazi concentration camps directed much of their pent-up hostility against themselves rather than their captors or those on the outside. Bettelheim, *supra* note 4, at 443.

93. Stressful life events generally are associated with attempted suicide. Zahara Solomon et al., *supra* note 6 at 302 [citing E.J. Paykel, *Contribution of Life Events to Causation of Psychiatric Illness*, 8 PSYCHOL. MED. 245 (1978)]. *See also* Dennis L. Peck, *Post Traumatic Stress and Life-Destructive Behavior*, 11 J. SOC. & SOC. WELFARE 876, 890 (1984) (From a content analysis of investigative reports and suicide notes, the researcher concluded that the breakdown in intimate relationships, the nonacceptance of situations controlled by others and the recognition of one's powerlessness in effectuating one's interests provide motivation for suicide).

94. *See generally* Edna J. Hunter et al., *Resistance Posture and the Vietnam Prisoner of War*, 4 J. POL. & MIL. SOC. 295 (1976).

95. The recent rise in sexual harassment claims further illustrate women's resistance. As reported in the *Wall Street Journal*:

> SEX HARASSMENT CLAIMS rise after Anita Hill's charges at Thomas hearings. General Motors Corp. reports a 50% increase in claims since last summer's hearings . . . (though it sees no increase in lawsuits). Claims filed at the Boston office of The Massachusetts Commission Against Discrimination tripled in November. Sex harassment charges filed with the Equal Employment Opportunity Commission increased to 1,244 in the first quarter of 1992 from just 728 a year earlier.

Labor Letter, WALL ST. J., Feb. 25, 1992, at A1.

While the increase in sexual harassment claims illustrates a level of resistance, it does not mean the complaining women would be willing to affiliate with the women's movement or resist their oppression in other areas.

96. Ursano et al., *supra* note 50, at 710; Ursano & Rundell, *supra* note 50, at 177. Perhaps, resistance occurs most frequently among higher ranked prisoners because they have more to lose if they acquiesce, they are less accustomed to degrading treatment, they are more uncomfortable with loss of control and their status promotes their internal sense of power.

Length of captivity also seems to positively correlate with resistance. Hunter et al., *supra* note 94, at 301. In this study, the longer the men were held captive the more likely

lar characteristics suggests that powerful elite women will be more inclined than less powerful women to resist.[97] This assertion provides little comfort.

Currently the women's movement suffers severe criticism for its alleged inability to relate to non-elite women.[98] Outspoken resistance by elite women thus might deepen the wedge between them and women who do not want to understand their vulnerable status as captives. The crucial task for feminists might be to shape resistance in a manner more palatable to the majority of women.

I do not see this suggestion as patronizing. Quite the contrary. Women's diverse reactions to the hearings graphically exposed the deep divisions between women in the United States. As the Senate nervously monitored opinion polls, most women told the Senators they could safely vote to confirm Thomas. This essay attempts to shed light on some reasons why so many women reacted this way.[99] Yet regardless of the reasons, what cannot escape recognition is that without the women who supported Thomas the power of the movement is anemic. Active attempts must be made by feminists to accommodate the diversity and division among women, or women's struggle for equality will grind to a halt. Accommodation thus need not be patronizing if it reflects a genuine interest in, if not agreement with, the perspectives of others.

Drawing yet another lesson from the POW experience, placement in a group, rather than solitary confinement, facilitates prisoner resistance.[100] From his study on Nazi concentration camps Bettelheim concluded that the best way to break the influence captors had over prisoners was to form democratic groups of resistance composed of independent, mature and self-reliant persons. For maximum effectiveness, he argued, each member of the group should back up every other

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they would avoid behaviors that the captors could use for propaganda purposes and would avoid bargaining with the captors. *Id.* at 306.

97. Yet, while elite women have more power to exercise, they also have more to lose if challenges to male hierarchy prove unsuccessful. Moreover, they experience isolation in a masculine workforce where success pits them against one another. Wolf, *supra* note 16. These forces combine to reduce political activism in privileged women.

98. A recent poll conducted by TIME/CNN proves symptomatic. The results showed that 63% of American women do not consider themselves feminists, 54% think the women's movement has not improved their lives, and 50% believe the women's movement does not reflect the views of most women. Nancy Gibbs, *The War Against Feminism*, TIME, Mar. 9, 1992, at 50.

99. I realize this essay seems to patronize all women who supported Thomas's nomination because it suggests their support was motivated by fear rather than an unfettered assessment of the candidate. Certainly room exists for a genuine difference of opinion among women that is not borne of a defensive reaction to a traumatizing event. Yet while I acknowledge the likelihood of genuine differences, I remain haunted by the commonality between Betty's and my reaction, as well as the responses of many women with whom I have spoken. Perhaps not all women felt trauma during the Thomas/Hill hearing, but I remain convinced that many did, and that this essay can help us understand the commonality beneath our diversity.

100. Hunter et al., *supra* note 94, at 295, 301. In this study, resistance was measured by (1) propaganda avoidance; (2) compliance under duress; (3) bargaining with captor; (4) non-commitment; (5) [military] code non-utility; (6) non-revelation of information; (7) non-liability; and (8) belligerence. *Id.* at 306.

member's ability to resist.[101] Support for Bettelheim's assertion comes from another study indicating that the formation of resistance groups by POWs in Vietnam proved healthy because it introduced an element of active mastery into the POWs captivity experience.[102] The formation of women's groups thus should facilitate their resistance to oppression. Again however I note problems inherent in this suggestion.

Resistance groups already exist in feminist circles. Members must continue to recognize the critical importance of these groups in empowering individual members to confront oppression.[103] Yet, many women vehemently deny association with the feminist movement and claim the movement has betrayed and ignored the interests of most women. Persuading these women to acknowledge and struggle against oppression proves difficult. Rather than attempting to force their integration into preexisting feminist groups, concerned feminists might best begin the process of persuasion by infiltrating non-feminist women's groups and sharing information designed to raise consciousness on issues reflecting oppression. Many issues not obviously subversive reflect women's oppression—the sexual and physical abuse of women and children, the economics of divorce, workplace attitudes toward women (sexual and economic), parental leave and the stresses of single parenting. Sharing information on these issues, without demanding ideological commitment to feminism, might promote activism among women who now do not want to become members of the women's movement. Their activism would help alleviate oppression and ultimately increase their own awareness.

One last word of caution from the POWs experience—POWs who firmly resist their captors bear the brunt of the enemy's pressure.[104]

101. Bettelheim, *supra* note 4, at 452.

102. Andersen, *supra* note 7, at 69.

103. Were it not, for instance, for the encouragement and support of my feminist (female and male) friends, as an untenured female law professor I doubt I would have written this essay.

104. Hunter et al., *supra* note 94, at 295. *See also* Andersen, *supra* note 7, at 67 (strong prisoner resistance brought the possibility of serious physical harm).

JUDGING THE FUTURE: HOW SOCIAL TRENDS WILL AFFECT THE COURTS

LARS FULLER AND CRAIG BOERSEMA*

I. INTRODUCTION

Over the next thirty years, technological and demographic changes will be occurring more rapidly than ever.[1] This reality challenges the quality of justice provided by today's judicial system. Fortunately, courts have the opportunity to prepare proactively for the changes that have been forecast. Considered on the "cutting edge" in judicial administration, nine state judiciaries—including Colorado's—are conducting or have completed long-range planning efforts (i.e. futures research), which examine developing social trends and attempt to set direction needed for the future.[2]

Long-range planners recognize that the future provides the opportunity to achieve certain goals. These planners identify social trends in order to better guide the achievement of those objectives. To organize their goals, planners develop a singular ideal—a "vision." After the vision has been defined, the planners outline the steps necessary for its implementation.

Consequently, long-range planning in the courts requires identification of social trends that will shape the future.[3] Futurists define a

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1. Dr. Lou House, Address at "Vision 2020: Colorado Courts of the Future" Executive Summary of the Task Force Training Session (January 18, 1991). Dr. House, the Director of External Research at U.S. West, in Englewood, Colorado, stated that technological information in the world is doubling every three years. *See* MARVIN CETRON & OWEN DAVIES, AMERICAN RENAISSANCE: OUR LIFE AT THE TURN OF THE 21ST CENTURY (1990).

2. Five states currently have active futures projects: Colorado, California, Massachusetts, Maine and Georgia. Virginia, Arizona and Utah have recently completed futures projects. Hawaii has institutionalized futures planning within its Judicial Department. The Colorado project is entitled "Vision 2020: Colorado Courts of the Future." It is structured around four task forces (Quality of Justice, Structure of the Courts, Administration of Justice, and Judicial Responses to Social Issues), and is comprised of over eighty task force members. The Colorado project is an eighteen-month effort, and a final report was submitted to the Colorado Supreme Court on March 31, 1992.

3. *Creating 21st Century Courts: Guidebook for Court Visioning* (The Institute For Alternative Futures, The Hawaii Research Center For Future Studies, The National Center for State Courts), Aug. 12, 1991, at 5 [hereinafter *Guidebook*].

trend as being a pattern of change over time.[4] Because demographics quantify certain elements of the population, they are especially helpful at identifying trends.[5] Through demographics, it is possible to determine population numbers and ethnic and racial breakdowns. Further, demographic statistics enable forecasting for workforce participation as well as for demands upon education and health institutions due to the impact of age and family statistics on those areas. Other topics, such as technology and the environment, have demographic implications as well.

Possible scenarios of how the future might look may be developed from these trends.[6] Each different scenario represents the reality that given society's influential factors, completely accurate prediction is impossible. Planners are able, however, to distinguish between probable, possible and unlikely scenarios. The ideal judicial system is then envisioned given those possibilities, and the final stage of the process identifies the specific steps that will achieve the ideal. By distinguishing what is truly desired and anticipating the developing trends, courts are able to use long-range planning to shape their futures and deliver the quality of justice expected by consumers.

This Article will address the first step of this methodology and identify major social trends that will impact the courts over the next thirty years. Demographic changes and emerging technology will affect the judicial system in many dramatic ways.[7] As caseloads increase with populations and state legislatures have more difficulty finding funds for the judiciary, the need for courts to plan for the future becomes particularly imperative.[8]

II. EDUCATION AND LABOR ISSUES

Both education and labor issues will play major roles in determining the status of future society. By the turn of the century, technological changes will radically shift the workforce into predominantly service related jobs.[9] Addressing this shift are today's educators, who are challenged to prepare students for workplaces and positions that currently

4. *Id. See* CLEMENT BEZOLD, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, MACROTRENDS AFFECTING DISPUTE RESOLUTION 1 (1990).

5. *Guidebook*, *supra* note 3, at 5. *See* Elizabeth Ehrlich, *Social Trends: How Will the Next Decade Differ*, BUS. WK., Sept. 25, 1989, at 142.

6. JAMES A. DATOR & SHARON J. RODGERS, STATE JUSTICE INSTITUTE AND THE AMERICAN JUDICATURE SOCIETY, ALTERNATIVE FUTURES FOR THE STATE COURTS OF 2020 (1991). Seven court-related scenarios for the future were developed, which conceived of different possibilities for society in 2020. *Id.*

7. For example, historically in Colorado a one-percent increase in population results in a two-percent increase in district court filings. Daniel J. Hall, Address at State Court Administrator's Office to Task Force 4 of "Vision 2020: Colorado Courts of the Future" (May 14, 1991). See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS 1984 ANN. REP. (1986); ARNOLD LINSKY & MURRAY STRAUSS, SOCIAL STRESS IN THE UNITED STATES: LINKS TO REGIONAL PATTERNS IN CRIME AND ILLNESS (1986).

8. James Austin, *America's Growing Correctional-Industrial Complex*, FOCUS, THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, Dec. 1990, at 1.

9. CETRON & DAVIES, *supra* note 1, at 352.

do not exist.[10] With the changes expected, the importance of preparing the potential workforce for new types of jobs has intertwined education and labor issues. Four trends will affect the future quality of education and labor in Colorado as well as the rest of the country, creating meaningful issues with which the courts must deal.

A. *Widening Skills Gap*

The rapidly widening gap between the job skills required of and held by the workforce is the most important emerging issue in the field of education and labor.[11] As new positions materialize and new skills are required, fewer workers will have the skills needed to fill jobs.[12] A shortage of qualified workers could lower productivity and income throughout society.[13] Businesses are already concerned about the scarcity of qualified "knowledge workers."[14] In addition, the demand for workers with highly technical skills may be hurt by labor shortages created by a slow growth in the working-age population.[15] The number of entry level workers has been decreasing since 1976 and is not expected to grow at all between 1988 and 2000.[16]

The skills gap will generate several critical changes in education.[17] Rapid technological advances and competition with younger and better educated workers overseas will go unmet if the United States continues to fail at teaching needed skills.[18] Lackluster test scores continue to sound the alarm for educational reform, and as the skills gap grows

10. "In the year 2000, 85 percent of high school graduates will be going into jobs that do not yet exist." Dr. Sharon Ford, Address at "Vision 2020: Colorado Courts of the Future," Inaugural Training Session (Jan. 18, 1991). *See* Elizabeth Dole, *Help Wanted: Skills for the '90s*, HUM. CAP., Nov. 1990, at 14.

11. WILLIAM B. JOHNSTON, WORKFORCE 2000: WORK & WORKERS FOR THE TWENTY-FIRST CENTURY 95 (1987). The skill mix of the U.S. economy will increase substantially by the end of the century. *Id.* at 98-99. *See* Barbara Kantrowitz & Pat Wingert, *A Nation Running in Place: Tests Show No Progress in a Competitive World*, NEWSWEEK, Oct. 14, 1991, at 54. "[W]ithout more sophisticated math skills,'we'll be a nation of people completely out of contention for jobs. We'll be a nation of unemployed people because most entry-level positions today require some proficiency in algebra and high-level mathematics.' " *Id.*

12. Dole, *supra* note 10, at 14. "The 'skills gap' would be disturbing and dangerous enough on its own. But its danger is heightened by the fact that our work force is growing at only 1% annually." *Id.*

13. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 425 (1990) [hereinafter CENSUS].

14. Companies surveyed are most worried about hiring "knowledge workers," or technically skilled employees and professionals, and claim they will continue to be the hardest to recruit. TOWERS PERRIN & HUDSON INSTITUTE, WORKFORCE 2000 4 (1990).

15. Although three-quarters of all Americans will be of prime working age—24 to 55—in the 1990s, the growth of the U.S. labor-force is slowing perceptibly. Ehrlich, *supra* note 5, at 142. *See* Howard Fullerton, *New Labor Force Projections, Spanning 1988 to 2000*, MONTHLY LAB. REV., Nov. 1989, at 3, 5.

16. There will be .4 percent fewer workers age 16-24 in 2000 than there were in 1988. Fullerton, *supra* note 15, at 4. *See* CETRON & DAVIES, *supra* note 1.

17. *Youth 2000 Task Force, Colorado's Competitive Edge, a Report to the Governor, Legislature, Business Community and Citizens of Colorado* 2 (1989) [hereinafter *Youth 2000 Task Force*]. *See* Dole, *supra* note 10. "Today's jobs demand better reading, writing, and reasoning skills and much greater competence in math and science." *Id.* at 14.

18. *See* Barbara Kantrowitz & Pat Wingert, *The Best Schools in the World*, NEWSWEEK, Dec. 2, 1991, at 50.

wider, radical changes may be proposed.[19] Slow growth in the working-age population will also necessitate educating and retraining an aging and diverse workforce.[20]

Within the labor force, future job market opportunities could be a boom for some and a bust for others.[21] Of the new jobs created over the 1984-2000 period, more than half will require education beyond high school and approximately one-third will be filled by college graduates.[22] Today, only twenty-two percent of all occupations require a college degree.[23] The median number of years of education required by new jobs created by the year 2000 will be 13.5, whereas the current number is 12.8 days.[24] The fastest growing jobs will require advanced math, and more language and reasoning capabilities than jobs currently available.[25] At the same time, the workforce will see a boom in service related jobs not requiring higher education.[26] However, in spite of this growth, only four percent of all new jobs will be filled by individuals with the lowest levels of language, reasoning and mathematical skills, compared to nine percent of jobs requiring such a level of skills today.[27] Over forty percent of new jobs will require advanced skills, compared with only twenty-four percent today.[28] In light of projected lower levels of migration into Colorado, the state's education system and employee training programs must educate workers as to the skills required to succeed in the future.[29]

The widening skills gap will increase the advantages of the economically privileged and emphasize the disadvantages of the poor. Those able to attain these needed skills through high quality education will be the most desired workers, creating an even more dramatic polarization of the "haves" and "have nots."[30] As employers continue to demand better educated and skilled workers, the unequal distribution of educational services will have a particularly harsh impact upon minorities. In particular, Blacks and Hispanics who lag significantly behind Whites in education will face the greatest difficulties.[31] Consequently, the strug-

19. *Id. See* CETRON & DAVIES, *supra* note 1, at 349.

20. CETRON & DAVIES, *supra* note 1, at 348. The increased use of automation and computers that demand a high degree of literacy will force businesses to provide continuous training for their workers in order to keep up with demands. *Id.*

21. TOWERS PERRIN & HUDSON INSTITUTE, *supra* note 14, at 4.

22. JOHNSTON, *supra* note 11, at 95-103.

23. *Id.*

24. *Id.*

25. *Id.* at 98-99.

26. It is estimated that over the next decade approximately one million new jobs will be created in the less-skilled and 'laborer' categories. CETRON & DAVIES, *supra* note 1, at 353.

27. Johnston, *supra* note 11, at 98-99.

28. *Id.*

29. Bill Kendall, *Selected Colorado Trends, Report to Vision 2020: Colorado Courts of the Future* 2 (Mar. 14, 1991). *See* Reid Reynolds & Jim Westkott, *Colorado's Changing Workforce, Report from the Colorado Division of Local Government* 2 (Oct. 1988).

30. *See* Emily Mitchell, *Do the Poor Deserve Bad Schools?*, TIME, Oct. 14, 1991, at 60. "[T]he U.S. has created a caste system of public education that is increasingly separate and unequal." *Id.*

31. The U.S. high school drop out rate is 25 percent (23 percent in Colorado); the

gle of those groups to achieve economic parity with Whites will be further restricted.

Educational reform continues to be a priority on both local and national political agendas.[32] Poor test scores and budget concerns will prompt calls for radical reform.[33] Private firms will challenge public schools to utilize technological advances in education, but experimental programs may use up scarce resources, resulting in delayed reform.[34] Programs that replace textbooks with computers and databases will be the most effective means of keeping pace with rapid technological changes. However, the inability of education to keep pace with the changing demands of the workplace could create an even clearer stratification of society. The potential is that within thirty years, possession of marketable work skills could become the most notable distinction in the separation of economic classes.

Impact Upon the Courts. The economic polarization caused by the skills gap will increase civil disputes through continued increases in cases caused by economic tension in society. Criminal courts will be more greatly affected.[35] Of particular concern is the potential for civil violence as rebellious "have nots" vent their frustrations against economic "haves" and seek economic redress.[36] With fewer government funds available for social service, and with prisons already teeming, more law abiding people will be victimized.[37]

Deficiencies in education also affect crime rates.[38] If the underprivileged are not better educated and given better opportunities, the courts may be faced with an entire class of criminals for whom the laws of society represent a conspiracy to maintain power. The growing numbers of urban youth gangs perhaps represent the precursor to this. Dispropor-

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dropout rate for Blacks is estimated at 40 percent, and for Hispanics it is estimated at 50 percent. Forty-one percent of minority youth are thought to be functionally illiterate. *Youth 2000 Task Force*, *supra* note 17, at 2.

32. CETRON & DAVIES, *supra* note 1, at 346-47.

33. *Id.* at 349-50.

34. *Id.* at 348.

35. Few would argue that the principal clients of the criminal justice system are those who occupy the lower economic strata of our society. Offenders and victims have always tended to be young, male, Hispanic and Black, illiterate, and unemployed .... Consequently, as the number of persons who experience severe economic and social condition increases, we can expect further increases in crime.

Austin, *supra* note 8, at 4.

36. John Bennett, *Is There Violence In Our Future?*, ROCKY MOUNTAIN NEWS, Dec. 27, 1990, at 4. Currently the U.S. is experiencing fundamental changes in the socio-economic structure of society. At the same time, there has been a rise in correctional populations and their associated cases. Austin, *supra* note 8, at 1.

37. Austin, *supra* note 8, at 6. "In economic terms, America is becoming a more fragmented and segregated society. Should these trends persist, there will be an associated increase in the incidence of crime and other social problems." *Id.* *See* Alex Prud'homme, *Chicago's Uphill Battle*, TIME, June 17, 1991, at 30.

38. Professor Lawrence Mead of New York University has noted that many ghetto Blacks have responded to their dilemma by "seceding from mainstream institutions—breaking the law, dropping out of school, not learning English [and] declining to work." George Will, *A Sterner Kind of Caring*, NEWSWEEK, Jan. 13, 1992, at 68.

tionate school dropout rates of minorities have played a strong role in the high poverty levels of those groups. The growing demand for technical skills in the workplace may make the failure to educate minority youths even more troublesome.[39] Additionally, changes in the education system brought about by louder calls for immediate reform, will attract litigation from parents who are unhappy with how the changes affect their children as well as from educational workers hurt by the reforms.[40]

B. *Increased Diversity*

The composition of the workforce will have increasing proportions of women, minorities and immigrants.[41] It will also be an aging workforce, with many older workers desiring or needing to extend their working life.[42] Consequently, the traditional concept that education ends when a person enters the workforce will be replaced by the realization that older workers must be retrained.[43] Further, the educational system will be faced with the challenge of teaching more diverse students.[44]

Growing diversity in the workforce will create several potential conflicts. The increase in numbers of aging workers and women will multiply disputes over health care benefits.[45] Businesses will feel the burden of paying the cost for advances in medical technology through worker benefits.[46] Worker productivity will also be challenged to keep this diversity working together. The changes may bring about the potential for continued discrimination in hiring, pay and promotion opportunities as well as the possibility for social tension as threatened White males react to their declining power base.[47] As a result, the harassment of

39. Austin, *supra* note 8, at 6.

40. Mitchell, *supra* note 30, at 61. "[M]any students from low-income families are in schools where they are not encouraged to take rigorous academic courses or the courses are just not offered." Anthony DePalma, *Coaching Courses Hike SATs, Report Finds*, DENV. POST, Dec. 18, 1991, at 2A.

41. "Women, minorities, and immigrants will account for more than 80 percent of the net additions to the labor force between now and the year 2000." *Youth 2000 Task Force*, *supra* note 17, at 2.

42. The growth rate for participation in the work force by civilians age 55 and older was -1.0 percent between 1976-1988. Between 1988-2000 the growth rate is projected to increase to .2 percent. Fullerton, *supra* note 15, at 5.

43. "The shrinking pool of entry-level employees, combined with the mounting skills crisis among them, is already forcing many corporations to undertake in-house training efforts or even outreach programs into their communities." Ehrlich, *supra* note 5, at 154.

44. Barbara Kantrowitz, *A Is for Ashanti, B Is for Black . . .*, NEWSWEEK, Sept. 23, 1991, at 45.

45. JOHN NAISBITT & PATRICIA ABURDENE, MEGA TRENDS 2000 230 (1990).

46. Merian Kirchner, *Who Pays For New Technology?*, BUS. & HEALTH, Oct. 1991, at 25. A 1989 survey by the National Association of Manufacturers found that the cost of providing health benefits already represented 37.2 percent of the average member's profits. Joyce Frieden, *Many Roads Lead to Health System*, BUS. & HEALTH, Oct. 1991, at 58.

47. Several new books argue that instead of racial hatred per se, white males fear that affirmative action will channel jobs to minorities and women. Howard Fineman, *Playing White Male Politics*, NEWSWEEK, Oct. 28, 1991, at 27.

women and minorities in the workplace will continue to be monitored.[48] The need to attract mothers to the workplace should force businesses to deal with problems of combining family roles with work assignments.[49] Day care and elder care, for example, may become essential components of a benefits package.[50] Socially, the increased economic status of women will reduce birth rates and impact divorce and marriage rates.[51]

Impact Upon the Courts. With more women and minorities entering the workplace, the courts can expect to face an increase in cases concerning equal opportunity and treatment. Victims of job-related discrimination may seek redress in the courts as diverse cultural and ethnic groups are forced to work together in the workplace. Nevertheless, workplace discrimination will persist, perpetuating disproportionate poverty levels among minorities.[52] Higher poverty among minorities will increase crime. Workers will be willing to question discriminatory terminations,[53] and the courts may also be faced with aggressive counter reactions by Whites to hiring quotas and equal opportunity programs.[54] Aging workers, confronted with economic concerns and better general health, may react to forced retirements with litigation.

More complex health benefit packages, needed to attract women and high caliber workers, will likely increase liability claims and disputes over coverage.[55] Other indirect issues resulting from increased workforce diversity will no doubt include divorce, parental responsibilities in childcare and spousal abuse. As working women continue to change the "traditional" family structure, society's dependence on them as the principal parent for children will increase the numbers of family cases.

Educational reactions to increasing diversity will be met with disputes concerning equal rights. Minority parents whose children suffer from unequal opportunities because of insensitive teaching practices or policies will pursue their cause in court.[56] Tension may mount regarding equal opportunity programs that favor minority status as economic hardships increasingly affect the White middle class majority. Curriculum or testing changes designed to make education more accessible to

48. Ted Gest & Amy Saltzman, *Harassment: Men On Trial*, U.S. NEWS & WORLD REP., Oct. 21, 1991, at 38.

49. CETRON & DAVIES, *supra* note 1, at 356.

50. "With most middle-age women in the paid work force, 'eldercare' will be a hot corporate benefit right alongside child care." Ehrlich, *supra* note 5, at 142.

51. CETRON & DAVIES, *supra* note 1, at 370.

52. Paul R. Krugman, *Economic Outlook: The Painful Cost of Workplace Discrimination*, U.S. NEWS & WORLD REP., Nov. 4, 1991, at 63.

53. Richard Johnson, *Most Age-Discrimination Charges will be pursued, EEOC Says*, DENV. POST, Dec. 3, 1991, at 1E. *See* Melinda Beck, *Old Enough to Get Fired . . .*, NEWSWEEK, Dec. 9, 1991, at 64.

54. Fineman, *supra* note 47.

55. Attractive benefit packages, particularly health care for employees and their dependents, are the backbone of corporate strategies to fill the labor shortages. Jayne Morehouse, *High Turnover Anxiety*, BUS. & HEALTH, Oct. 1991, at 96.

56. *See* Jerry Adler, *African Dreams*, NEWSWEEK, Sept. 23, 1991, at 42; Ehrlich, *supra* note 5, at 144.

diverse groups will be disputed in court by conservative parents who feel that these changes sacrifice their children's educational rights. As social diversity grows and economic hardship increases, the role that education plays in enforcing ethnic and social division will come under scrutiny by the courts.

C. *Organization*

Structural changes in education will occur both in the way people work and the manner in which students are educated. In the workplace, home-based workers, flexible and part-time schedules and the numbers of self-employed workers will increase.[57] The employer-employee relationship will also be affected as traditional employer supervision becomes balanced with employee initiative. In education, the inability of the current system to keep pace with foreign competitors will prompt organizational changes in education.

One organizational change within the workforce is the decline of labor unions.[58] Because of the continued shift away from industrial jobs where labor unions have traditionally thrived, the percentage of union workers in the workforce will decline. The lack of labor representation within many service industries is related to the multiple career changes many workers face. The traditional notion of working an entire career with the same company has been replaced by a desire to minimize forced career changes.[59] Job instability will continue through a worker's career as businesses continually move to streamline their operations.[60] The result is: many aging baby boomers will find themselves fired from jobs from which they expected to retire.[61] In addition to management efficiency, companies concerned with huge expenditures in worker's pensions will see the necessity of terminating long-time employees.[62] Businesses will need to scale back operations by laying off workers, while facing a shortage of skilled laborers. Although businesses will compete fiercely for top workers, those employees will compete just as fiercely for those jobs.[63] Along with the need to reduce pension and benefit expenses paid to older workers, the trend of businesses downsizing their

57. "The number of people who work at home is projected to nearly double by 2000, from 30 million in 1990 to 56 million in 2000." Jo Ann Tooley & Amy Bernstein, *Measures of Change*, U.S. NEWS & WORLD REP., Dec. 25, 1989, at 6-7. *See* Bruce A. Taylor, *Innovations in the Information Age*, HUM. CAP., Nov. 1990, at 34.

58. "Only one in eight young men with blue-collar jobs belongs to a labor union; 20 years ago that number was three times as high." Marc Levinson, *Living on the Edge*, NEWSWEEK, Nov. 4, 1991, at 25. *See* CETRON & DAVIES, *supra* note 1, at 358.

59. *See, e.g.*, NAISBITT & ABURDENE, *supra* note 45, at 221. "The average American entering the work force today will change careers three times according to the Labor Department. Private experts tell people to count on five different careers." *Id.*

60. CETRON & DAVIES, *supra* note 1, at 362. *See* Dorrie Jacobs, *Dealing With the Downsizing Dilemma*, HUM. CAP., Nov. 1990, at 20.

61. Gene Del Vecchio, *A Question of Loyalty*, NEWSWEEK, Sept. 23, 1991, at 8.

62. Steven Findley, *A Blow To Your Benefits*, U.S. NEWS & WORLD REP., Oct. 21, 1991, at 100. "Some of the most tempting targets for layoffs are older, highly paid employees." Beck, *supra* note 53, at 65.

63. CETRON & DAVIES, *supra* note 1, at 361.

management teams will continue. The traditional ladder of advancement will be eliminated, and middle management level workers may see narrow possibilities for promotion and increased job competition.[64]

The elimination of middle management positions will occur simultaneously with the bifurcation of job opportunities. The lack of jobs traditionally filled by the middle class could sharply effect society, the economy and family structures.[65] As management level workers lose their jobs, the majority of work opportunities will be in areas for which they are overqualified—jobs requiring minimal education and offering meager responsibility or opportunity for advancement. A significant number of today's middle class will fall into poverty, while the highly skilled workers will continue to thrive.[66]

Impact Upon the Courts. Organizational changes occurring in education and labor will continue to affect the courts. As businesses attempt to streamline operations and cut costs, the courts will see growing numbers of wrongful termination suits involving employees' lost pension funds. Working without the protection of a union, people will turn to the courts to resolve employer-employee disputes.[67] Union decline will also exacerbate economic stratification.[68] Such economic polarization will lead to significant increases in the number of impoverished people impacting the criminal system. The overburdened courts will respond to the demands of a surge in criminal cases.[69]

Courts may also need to resolve disputes involving job safety for off-site workers and pay equity issues for part-time workers. Increased international trade in goods and service and more foreign ownership of U.S. based companies will create work organization dispute and may create even greater stresses upon national and local economies.[70]

Within education, changing structures will increase disputes between those eager to enact reforms and those hesitant to abandon tradition. Because of the importance that society places upon education, much of the tension caused by changes in the workforce and the econ-

64. *Id. See* Del Vecchio, *supra* note 61, at 8.

65. "After wave upon wave of corporate restructurings and downsizings, even seemingly well-situated families don't feel secure." Levinson, *supra* note 58, at 25.

66. The current recession has significantly hit the middle class. Nearly 600,000 of the lost jobs belong to middle managers and other white-collar workers as companies slash payrolls because of "slow sales, crushing interest charges and tough foreign competition." John Greenwald, *A Slump That Won't Go Away*, TIME, Oct. 14, 1991, at 42-43.

67. Findley, *supra* note 62, at 100.

68. Harvard economist Richard Freeman reckons that the weakening of labor unions accounts for one-fifth of the increase in the wage gap since 1978." Levinson, *supra* note 58, at 22.

69. The system is overburdened in at least two aspects—delay and prison overcrowding. The ABA standard for criminal dispositions is 100 percent of cases disposed in one year. Craig Boersema, *Report to Task Force 3, Vision 2020: Colorado Courts of the Future, Civil Litigation and Alternative Dispute Resolution* (Sept. 1991). *See* U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN (May 1990). The prison population has more than doubled from 329,821 in 1980, to 703,687 at the close of 1989, an increase of 113.4 percent. *Id.*

70. Levinson, *supra* note 58, at 24.

omy will be focused upon the weaknesses of the public system. As concern and strain grow, the courts will remain an outlet for dissension.

D. *Content*

Changes are expected in the nature of the work much of the labor force will perform because of the growth of information/knowledge industries and trade and service industries. Changes are also occurring in the field of education. Accessing information to teach technical problem solving skills will force a shift in traditional teaching curricula.

Technological advances will also dramatically influence the workforce in the next thirty years. Society is experiencing an information explosion made possible by quantum advances in technology.[71] With these advances, work will be completed more efficiently and less expensively.[72] Because of the influx of information, professionals of all fields are being forced to specialize their expertise.[73] This specialization movement concerns some who feel that people will become disassociated from control of society.[74] Technology also represents an opportunity for productivity to increase.[75] Nevertheless, a concern is that its impact may not be as economically effective as previous production gains—while technology can increase productivity, it may be at the expense of the laborers. As more workers are replaced by technology, the greatest reward of higher production could go to business owners, while the workforce could remain unaffected.[76]

The shift from an industrial to a service-related economy may result in a lower standard of living for many in the workforce.[77] The movement to service sector jobs will present two types of opportunities. First, there will be a surplus of jobs that demand highly skilled and specialized workers. Businesses will aggressively compete for the relatively small number of laborers qualified to fill those positions.[78] Second, another surplus of jobs will appear in positions where minimal education is re-

71. House, *supra* note 1, at 5.

72. John Schwartz, *The Highway to the Future*, NEWSWEEK, Jan. 13, 1992, at 56.

73. "Within professions (medical, legal, engineering, etc.) the body of knowledge that must be mastered to excel in a particular area precludes excellence across all areas." CETRON & DAVIES, *supra* note 1, at 352.

74. *Id.* at 354.

75. *Id.* at 331. "Economic growth will continue as technological gains in the manufacturing sector boost productivity, and as slow growth in the labor force is offset by workers who remain in the labor force." *Id. See* Ehrlich, *supra* note 5, at 142.

> [T]he 90s could turn out to be a period of extended economic prosperity. The baby boom generation . . . is reaching peak productivity. And with the growth rate of the work force falling to one percent per year, the lowest since the 1950s, employers won't have to absorb and train a flood of new workers as they have for 20 years. That frees resources to make current workers more effective.

Id.

76. Schwartz, *supra* note 72, at 57. "Without proper planning, network expansion could widen the gap between rich and poor. The vast educational resources might only go to the data-haves—such as computer owners—leaving the poor behind . . . ." *Id.*

77. "Service jobs have replaced the many well-paying jobs lost in manufacturing, transportation, and agriculture. Low-paying and often part-time, these new jobs pay wages at half the level of manufacturing jobs." CETRON & DAVIES, *supra* note 1, at 353.

78. Del Vecchio, *supra* note 61, at 8.

quired.[79] Advancement opportunities will be scarce in these jobs. Traditional jobs in mining, construction and manufacturing that account for more than one in six jobs in today's Colorado economy will be displaced. They will provide for fewer than one in twenty of the new jobs in the next twenty-five years.[80]

Educational systems will be evaluated by their ability to teach measurable technical skills.[81] The focus upon evaluating educational content will turn parents' attention toward those factors. The preliminary result will be that financially empowered parents will be able to respond to the change and grant their children a head start in becoming successful in changing society. Education reformers will rely on technology to increase the productivity of educators. However, the business sector will take advantage of these new technologies before the public education system is able to do the same. Further, other countries may be able to adapt their educational systems more quickly to the emerging demands of the global market.

Impact Upon the Courts. The shift in work content caused by information and technology industries will affect the courts in several ways. Civil rights principles and right to privacy issues will be repeatedly disputed.[82] Particularly volatile issues will be those theoretical and philosophical ones that society has not yet resolved.[83] These issues may present opportunities to enjoin communities and raise the tolerance for diversity. The concern remains, however, that society's inability to come to agreement on fundamental values will make the introduction of many new technologies difficult.

The management and operation of the courts will also be affected by information and technology. Increased information can address weaknesses in judicial services in areas such as access and communication. Improved access to information could eliminate the monopoly on legal information held by attorneys. As a result, it may be possible that some legal decisions will be made by non-attorneys.

III. GENDER, FAMILY AND RACE ISSUES

Both women and non-Anglo ethnic groups face particularly unique challenges in American society, and issues concerning these groups will

79. *Youth 2000 Task Force, supra* note 17, at 2-3. Because of a shrinking labor pool of 16-24 year-olds, there will be a demand for workers to fill entry level positions. *Id. See* CETRON & DAVIES, *supra* note 1, at 353 & 360.

80. Kendall, *supra* note 29, at 3.

81. Kantrowitz & Wingert, *supra* note 18, at 51.

82. *See* Richard Zoglin, *Justice Faces a Screen Test*, TIME, June 17, 1991, at 62; Joe Schwartz, *Educating Away Privacy Fears*, AM. DEMOGRAPHICS, Sept. 1991, at 47. "Communication networks offer the promise of more personalized media and widespread telecommuting, but they also threaten individual privacy and increase the potential for information discrimination." Scott Cunningham & Allan Porter, *Communication Networks: A Dozen Ways They'll Change Our Lives*, THE FUTURIST, Jan.-Feb. 1992, at 19.

83. Lance Morrow, *When One Body Can Save Another*, TIME, June 17, 1991, at 54. "Technology is developing so rapidly that new practices are outpacing society's ability to explore their moral implications." *Id.* at 56.

continue to mark a trend toward equalization and cultural diversity. Principles of equality may influence the next twenty years more than any epoch since the Civil War. Uniquely tied to the changes that the assertion of women and minorities' rights will bring in the future is the role of the family. How family, gender and race issues evolve over the next thirty years will form the basis for the American community in the year 2020, and the courts will be asked to play a vital role in shaping this development.

A. *Gender*

Economically, women are confronted with distinctive challenges and hardships because of disparate pay scales. Women also face unequal opportunities not only in acquiring certain positions, but in advancing to executive and supervisory positions. As more women move into the workforce, the makeup of the family will continue to change, and attention will be paid to the disproportionate burden of divorce and single-parenthood upon women. As women assert a redefined role in the community, more energy will be spent on eliminating the obstacles that prevent them from accessing leadership and management positions in society.

The woman's changing role will greatly affect the workplace.[84] As women become an equal percentage of the workforce, the disparity between their incomes and the incomes of men will continue to be a point of contention.[85] A report by the National Committee on Pay Equity concludes that the wage gap is one of the major causes of economic inequality, and that discrimination is the cause.[86] In 1981 the National Academy of Sciences found that less than twenty-five percent of the wage gap is due to differences in education, labor force experience and commitment, suggesting that wage differences are primarily gender based.[87] In 1985, the United States Bureau of the Census reported that differences in education, labor force experience and commitment accounted for less than fifteen percent of the wage gap between women and men.[88]

Women are also limited in their opportunity to pursue different professions. Although women have entered male-dominated occupations in increasing numbers, they nonetheless remain concentrated in traditional clerical and service occupations.[89] The opportunity to ad-

84. Nationally, men will remain a majority of the labor force, but when growth rates are compared, the male labor force is projected to grow by only 11 percent over the 1988-2000 period, compared with a projected growth of 22 percent for women during the same period. Fullerton, *supra* note 15, at 7.

85. Women still earn on an average 60-70 percent of what men typically earn. *Workforce 2000 and Beyond: Jobs and Workers for Colorado's Future*, THE ADVOCATE, Apr. 1989, at 8.

86. PAULA S. ROTHENBERG, RACISM AND SEXISM: AN INTEGRATED STUDY 71 (1988).

87. *Id.* at 73.

88. *Id.*

89. *Report of the Commission of Women in the Profession: Part 1*, THE BUS. LAW. UPDATE, Sept.-Oct. 1988, at 6, 7. In 1986, women were only 4.4 percent of all dentists, 6.0 percent

vance to leadership positions will remain limited by the "glass ceiling" phenomenon.[90] As with the wage gap disparity, this reality will be the focus for reform.

Another cause of the "stunted" economic status of women is the values that society continues to impose on them. Despite the massive influx of women into the workforce through the 1970s and 80s, many still perceive that women should obtain their professional status while at the same time remaining at home to raise children.[91] Working women are also expected to be the primary parent.[92] However, as the trend of independence continues through the turn of the century, traditional values will fade and the family structure of the 1950s will become a relic.[93] Working women will still take the lead in establishing child care opportunities, however, and while the demand for such care has dramatically increased, child care of acceptable quality remains difficult to find or afford.[94]

The issues of economic inequality are compounded by divorce. Single parent women suffer poverty in disproportionate numbers because of the failure of fathers to adequately support children.[95] Although the average Aid to Families with Dependent Children (AFDC) payment to a family of four rose approximately fifty-two percent between 1974 and 1988, prices almost doubled during the same period, causing single-parent women to experience a real decline of more than twenty-five percent in their financial resources.[96] Even women without dependent children are disadvantaged by divorce. The consequences of divorce are worse financially for many women because they tend to lack adequate marketable skills—a consequence of their position as homemaker during the marriage.[97]

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of all engineers, 18.1 percent of all lawyers and judges, 4.8 percent of all police and detectives, and 17.6 percent of all physicians. In the same year, however, women comprised 99 percent of all clerical workers, 94.3 percent of all registered nurses, 96.5 percent of all child care workers, 87.9 percent of all telephone operators, 85.2 percent of all teachers (excluding colleges and universities), and 91.1 percent of all data entry operators. ROTHENBERG, *supra* note 86, at 69-70.

90. SARAH HARDESTY & NEHAMA JACOBS, SUCCESS AND BETRAYAL: THE CRISIS OF WOMEN IN CORPORATE AMERICA 209 (1986); *See* Carol Hymowitz & Timothy D. Schellhardt, *The Glass Ceiling: Why Women Can't Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs*, WALL ST. J., Mar. 24, 1986, § 4.

91. ROTHENBERG, *supra* note 86, at 70.

92. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 3, 43 (1988). "In most marriages, one parent, normally the mother, assumes day-to-day primary care." *Id.*

93. Jo Ann Tooley & Amy Bernstein, *Measures of Change*, U.S. NEWS & WORLD REP., Dec. 25, 1989, at 6.

94. "The nation's child-care centers are increasingly crowded and supervision is declining, depriving millions of children of attention they need at a critical age. Since the 1970s, enrollment at childcare centers has increased four-fold." Janet Bingham, *Child Care Centers 'Overcrowded, Understaffed'*, DENV. POST, Nov. 8, 1991, at 1A.

95. CENSUS, *supra* note 13, at 459, 462. Between 34 percent and 45 percent of families with a female householder, no husband present, were below the poverty level in 1987. *Id.*

96. *See* ROTHENBERG, *supra* note 86, at 81.

97. COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER & JUSTICE IN THE COLORADO COURTS 13 (1990) [hereinafter GENDER BIAS].

Women suffer most disproportionately in terms of violence.[98] It is estimated that one-quarter to one-third of married women experience serious violence in their homes, and some studies estimate the number as high as seventy percent.[99] Some form of violence happens in one-fourth of all marriages.[100] One woman is raped in America every six minutes.[101] Approximately two-fifths of women have been sexually molested by a member of their family, and over one-third of women have been raped.[102]

The failure of society to regard the physical protection of women as a fundamental right has just begun to change.[103] Although women will continue to insist this victimization cease, the tendency of males to respond to female independence with violence seems likely to persist.

Impact Upon the Courts. With more women moving into the workforce, there will be an escalating focus on women and workplace issues, such as sexual harassment.[104] Unequal workplace issues such as disparate wage practices will be individually litigated through the judicial system.[105] Scarce and inadequate child care will also be treated as a rights issue affecting women disproportionately.

Gender issues will also greatly impact family law. The disparate financial impact of divorce will lead to alternatives that protect women and their families to a greater degree.[106] The courts' participation in the feminization of poverty will also be a major target of reformers. Many feel the judicial system's inability to adequately enforce child support payments has played a major role in the institutionalization of juvenile delinquency and the poverty of single mothers. Finally, as more women become political leaders, violence against women should become a priority in the judicial system.

B. *Families*

The fundamental institution of American society is the family, from which each generation learns the values and behavior it will assume. The family, as an institution, is undergoing massive restructuring. The number of families living in poverty is also a major concern, as the im-

98. *See* Robert Prentky & Ann W. Burgess, *Rehabilitation of Child Molesters: A Cost-Benefit Analysis*, 60(1) AM. J. ORTHOPSYCHIATRY 108, 114 (1990).

99. *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 24 (1987).

100. *Id.*

101. *Id.* at 23.

102. *Id. See* BARRY M. MALETZKY, TREATING THE SEXUAL OFFENDER 222 (1991).

103. Eloise Salholtz, *Sex Crimes: Women On Trial*, NEWSWEEK, Dec. 16, 1991, at 22.

104. Annetta Miller & Dody Tsiantar, *Mommy Tracks*, NEWSWEEK, Nov. 25, 1991, at 48. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). In *Ellison*, the Ninth Circuit Court of Appeals held that in determining whether sexual harassment is sufficiently severe to be actionable, the court should focus on the female victim's perspective, and not a man's point of view (i.e., the reasonable woman standard versus the reasonable man). *Id.*

105. Vicky Cahan, *Women At Work*, BUS. WEEK, Jan. 28, 1985, at 80, 82.

106. Statistics show that nine out of ten men granted joint custody or visitation rights pay only some child support. *Half Of All Child Support Payments Fall Short, Census Finds*, DENV. POST, Oct. 11, 1991, at A13.

pact of financial hardships continues to burden the courts.[107] Another consideration for the judiciary is the victimization of families by crime. With society so dependent upon the family's ability to maintain order and happiness, the lack of protection that many families experience bears a significant impact.

The decline of the "traditional family" (i.e. dual spouse, single wage earner) is the most notable transition occurring. The number of single-headed households increased during the 1980s.[108] In 1960, sixty-one percent of households were single wage-earner, traditional families. Today that figure is twenty-two percent.[109] With more children being placed in child care, many people are concerned about how current and future generations of children will be raised.[110] The family role of teaching values and providing a sense of community to children will be transferred to churches and schools.[111] Traditional families will consist of fewer children,[112] and several "generations of" family members may live under the same roof.[113]

The need for dual parent incomes to accommodate even a minimally comfortable lifestyle will result in more single parent families living in poverty.[114] As income inequality continues to increase through the year 2000, two income families will increase, while single parent households will fall further behind.[115] Nearly one-third of all children were living below poverty in 1990,[116] and the numbers of children who are growing up poor will affect the criminal courts through an increase of cases. An underclass of impoverished children presents an even greater variety of concerns, however.[117] Economics play a critical role in a child's future, and the lack of opportunities facing children at the lower end of the economic scale is a considerable family and societal

107. Austin, *supra* note 8, at 4. Between 1980 and 1988 the number of persons living in poverty increased from 26 million to 32 million, a 23 percent increase. *Id.*

108. Austin, *supra* note 8, at 4. The number of single parent families increased from 22 percent in 1980 to 27 percent by 1988. *Id*; CETRON & DAVIES, *supra* note 1, at 372. *See* Barbara Kantrowitz, *Breaking the Divorce Cycle*, NEWSWEEK, Jan. 13, 1992, at 48.

109. Martha F. Riche, *The Future of the Family*, AM. DEMOGRAPHICS, Mar. 1991, at 44.

110. "We as a society will pay the cost in children who are not prepared to function effectively later—either socially or in school. Skills gained in the preschool years are the foundation for all learning that follows in school and in life." Bingham, *supra* note 94, at 1A.

111. *See* Taylor, *supra* note 57, at 37 (noting that schools have been enforced to assume the role of parenting).

112. *See* CETRON & DAVIES, *supra* note 1, at 369.

113. *See Outlook '90*, THE FUTURIST, July-Aug. 1989, at 39.

114. *See* CETRON & DAVIES, *supra* note 1, at 372. Between 1970 and 1980 the proportion of families in poverty who were maintained by women rose from 36 percent to 50 percent—a net increase each year of approximately 100,000 families. ROTHENBERG, *supra* note 86, at 80.

115. *Children of Divorced Snubbed*, ROCKY MOUNTAIN NEWS, May 4, 1991, at 7.

116. Richard Thomas, *Middle-Class Blessings: Another View*, NEWSWEEK, Nov. 4, 1991, at 25.

117. Jean Seligmann, *An 'F' for the Nation's Kindergartners*, NEWSWEEK, Dec. 16, 1991, at 59. More than a third of all children aren't ready to learn when they start school. The president of the Carnegie Foundation for the Advancement of Teaching says that largely because of poverty too many children "are already shockingly restricted even before their first formal lesson." *Id.*

concern.[118]

Crime will substantially threaten family living. Approximately one in every four households will be victimized by at least one crime of violence or theft each year.[119] Accompanying the detrimental effects of the victimization itself is the perception that the judicial system does not offer families any protection from crime. A general mood of societal insecurity is neither a credit nor a benefit to the courts. Questions also exist about the ability of the judicial system to constructively deal with juveniles. Studies indicate that current treatment simply habituates adult criminal behavior and that alternative sentencing may be more appropriate.[120]

Inter-family crime is also particularly destructive. Over two million children were reported abused in 1987.[121] These reports, however, offer only a fraction of the actual abuse occurring. Especially in cases of sexual abuse, it is difficult to determine whether such abuse is on the rise.[122] Although the numbers may vary, it is evident that a significant number of children are being victimized.[123]

Impact Upon the Courts. If the concerns of some sociologists are justified, changing family structure will lead to more disputes in the future.[124] The disproportionate ethnic breakdown of juvenile offenders correlates to ethnic economic levels, suggesting that poverty plays a large role in delinquency.[125] Criminal courts should anticipate more cases, as a significant percentage of children move into adulthood with minimalized opportunities.[126]

The failure of the justice system to adequately protect families from

118. ROTHENBERG, *supra* note 86, at 55-56. Economic status, rather than brains, predicts a child's future. *Id.*

119. *See generally* ARTHUR J. LURIGIO, WESLEY G. SKOGAN & ROBERT C. DAVIS, VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS (1990).

120. *See* James Austin & Barry Krisberg, *The Unmet Promise of Alternatives to Incarceration*, CRIME AND DELINQUENCY, July 1982, at 374-409. "The effectiveness of ['an eye for an eye'] for the redress of wrong doing has its limitations .... Those of us who have acquired some expertise in modifying behavior, whether we are parents, teachers or therapists, appreciate the liabilities of wanton punishment in effecting long-term behavioral change." Prentky & Burgess, *supra* note 98, at 115.

121. Christine Gorman, *Incest Comes Out of the Dark*, TIME, Oct. 7, 1991, at 46, 47. It is estimated that perhaps 80 percent of the 200,000-360,000 cases of child sexual abuse that occur each year involve incest. "Surveys in California and Massachusetts in the 1980s found that as many as 1 in 5 girls and 1 in 7 boys under the age of 18 had been sexually abused by a relative—anyone from a father to a mother or an in-law." *Id.*

122. CENSUS, *supra* note 13, at 176.

123. Prentky & Burgess, *supra* note 98, at 114. "Perhaps the most critical hidden impact is the suspected cyclic perpetuation of child sexual abuse. While it may be overly simplistic to conclude that abuse necessarily begets abuse, the link between sexual abuse at an early age and inappropriate sexual conduct in adulthood has been frequently noted." *Id.*

124. Regarding the changing structure of the family, Johns Hopkins sociologist Andrew Cherlin says that "[w]e're in the midst of a huge social experiment. We don't know what the long-term effects will be." Kantrowitz, *supra* note 108, at 49.

125. In 1987, the nonwhite delinquency case rate (68.1 percent) was 75 percent greater than the White rate (38.8 percent). U.S. Dep't. Just., *Juvenile Justice Bulletin: OJJDP Update on Statistics*, July 1991, at 4.

126. RICHARD LAMM, MEGATRAUMAS: AMERICA AT THE YEAR 2000 84-89 (1985).

crime will also persist. Resulting public unrest will put more pressure on the courts. Alternatives to protection by the police and the judiciary will be private security and citizen responses, the legality of which may be challenged in courts.[127] Every class will feel the effect of having to seek protection from criminal victimization, resulting in a society that feels unprotected, apprehensive and unsettled.[128]

C. *Racial and Ethnic Groups*

Minority racial and ethnic groups are also expected to fight for rights long kept from them. Like women, minorities will constitute a growing proportion of the workforce. Similarly, they will continue to face a conspicuous gap in wages. The disproportionate percentage of lowerclass minorities will continue to rise, raising concerns and tensions. Particular attention should be directed at the causes of the disparate participation rates in the criminal justice system. Minorities will exert more political influence as the population of Blacks, Hispanics, and Asians increases to 23-28% by 2000.[129] During the 1980-1990 period, the nation's minority group populations increased nearly five times the rate of the Anglo population.[130] Similarly, while Anglos are still expected to maintain a nearly four-to-one majority in the workforce by the year 2010, increases in the numbers of minorities will trigger changes in workforce composition.[131] Both Blacks and Hispanics continue to enter the workforce at faster rates than Whites.[132] Between 1988 and 2000, the minority workforce is expected to grow at three times the rate of the Anglo workforce.[133] These demographic changes promise to bring about modifications in the White-dominated status quo, changes that could increase disputes over unfair labor practices. Part of the conflict will come from Whites reluctant to give up power and control, making the transition potentially turbulent.[134]

Accompanying the influx of minorities into the workforce is a signif-

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127. *See generally* BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990).

128. *See supra* note 127.

129. CETRON & DAVIES, *supra* note 1, at 337.

> About 20 million people of Latin American background now live in the U.S. In the 1980s, their numbers have grown five times as fast as the non-Hispanic population. High levels of immigration and high birthrates are expected to keep that growth going well into the next century. Hispanics, now 8 percent of Americans, may be the largest ethnic minority by 2015, surpassing blacks.

Ehrlich, *supra* note 5, at 144.

130. CENSUS, *supra* note 13, at 14-16. By 2010, minority groups will comprise 30 percent of the national population. *Id.* at 14-15.

131. CETRON & DAVIES, *supra* note 1, at 357. *See also* TOWERS PERRIN & HUDSON INSTITUTE, *supra* note 14, at 1. "The proportion of blacks in the labor force is projected to rise to 12 percent by 2000, compared with 10 percent in 1976 and 11 percent in 1988. Hispanics are projected to increase their share of the labor force from 7 percent in 1988 to 10 percent by 2000." Fullerton, *supra* note 15, at 3.

132. Fullerton, *supra* note 15, at 4.

133. *Id.*

134. Scott Minerbrook & Miriam Horn, *Side By Side, Apart*, U.S. NEWS & WORLD REP. Nov. 4, 1991, at 44.

icant gap in their earnings compared to earnings of White workers.[135] In 1985, Black and Hispanic men who worked full-time had average earnings of $17,479, while the average salary for a White man was $25,062.[136] The disparity for minority women is even greater. The average full-time salary for White women in 1985 was $15,796; for Black women it was $14,308; and for Hispanic women it was $13,066.[137] A 1987 study done by The National Committee on Pay Equity concluded that in New York state, a five to six percent increase in Black and Hispanic representation in a job was accompanied by a five percent salary decrease for the position.[138]

The wage gap, however, is only one of many factors that contributes to the high numbers of minorities in poverty. Between 1962 and 1982, Blacks gained in education, political representation and white-collar employment, but not in overall jobs or income.[139] The burden of poverty falls on families headed by minority women.[140] Almost three-fourths of poor minority families are headed by women.[141] Minority women not only bear the economic disadvantage of unequal racial practices, but of unequal gender practices as well.[142] Consequently, one out of every two Black children and one out of every three Hispanic children are living in poverty.[143]

The unequal number of poverty-stricken minorities is created in part by the lack of opportunities available through traditional means of improvement. Racial and ethnic minorities have been subject to more educational, health, crime, drug and alcohol-related stresses than the White middle class.[144] This trend has worsened in recent years.[145] Unequal opportunities between Whites and minorities will be exacerbated

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135. ROTHENBERG, *supra* note 86, at 55. "[T]he employment, earnings, and social mobility gaps separating blacks and whites in this country have scarcely changed in a century." *Id.*

136. *Id.* at 71.

137. *Id.*

138. *Id.*

139. *Id.* at 82-83. *See also* Krugman, *supra* note 52, at 63.

> In 1970 the median income of black families was 60 percent of white family income; by 1990, the ratio had actually fallen to 58 percent. Over the past 20 years, unemployment among blacks has risen higher in each successive recession and fallen less with each recovery. In 1970, black unemployment was 8.2 percent; by 1990, it had reached 11.3 percent. Black impoverishment hasn't fallen either. In 1990, almost 32 percent of blacks lived in poverty, up from about 30 percent in 1974. And black men who work full time earn 30 percent less than white male counterparts, a gap that has grown since the 1970s. Working women are an exception. Black women who hold full-time jobs earn just 10 percent less than white women. . . . It is virtually impossible to look at the economic state of blacks today without turning to issues of family and social cohesion—and it is next to impossible to raise those issues without touching raw nerves. And, with 45 percent of black children living in poverty and 62 percent born out of wedlock, these problems are likely to get worse.

Id.

140. GREG J. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY: THE CHANGING ECONOMIC FORTUNES OF AMERICAN WORKERS AND FAMILIES 63 (1984).

141. *Id.*

142. *Id.*

143. Austin, *supra* note 8, at 4.

144. Often overlooked in the disproportionate numbers of Hispanics and Blacks that

by the coming changes in the workplace.[146] Prospects for professional, technical, managerial, sales and service jobs will be more prevalent than opportunities in other fields more dependent upon education.[147] Despite labor shortages, the unemployment rate for Blacks is more than twice as high as the rate for Whites.[148] Additionally, the number of minorities participating in the labor force (i.e. employed or looking for work) has been steadily declining.[149]

The racial and ethnic disparities found in education, labor and economics are also found in the criminal justice system.[150] Minorities receive higher sentences in criminal cases than do Whites charged with the same crime.[151] The numbers of Black and Hispanic males that are either incarcerated or on probation or parole on any given day are grossly disproportionate to their percentage of the population.[152] Although crime rates increased by only two percent in the period during 1979-88, the number of prison inmates doubled during that time—inmates that were disproportionately non-white.[153]

As the political and social strengths of minorities grow, they will demand that equality become a reality, not a goal. The civil rights victories of the 1960s were helped along by the apathy of many unaffected Americans. With today's technology, the media enjoins everyone in the country in majority-minority confrontations.[154] Few will be exempt from responding to the growing diversity, and it is not yet clear whether the majority will prove itself to be more or less amenable to equalizing minorities rights than past generations.[155]

Impact Upon the Courts. The influx of minorities into the workforce could create friction from Whites unprepared for the growing diversity. Minorities may use courts to counter White dominated management when business practices are discriminatory. Blacks and Hispanics may also address inequalities in wage levels more aggressively as cultural diversity begins to infiltrate into all areas of leadership.

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participate in the criminal justice system is that ethnic and racial minorities are disproportionately victims of crime. *Id.* at 4.

145. *See* ROTHENBERG, *supra* note 86, at 88-98.

146. *See supra* notes 17-31 and accompanying text.

147. *See* JOHNSTON, *supra* note 11, at 95-103.

148. U.S. DEPT. OF LABOR, OPPORTUNITY 2000 65-69 (1988).

149. *Id.*

150. Austin, *supra* note 8, at 2.

151. *See* JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM viii (1983).

152. Over one out of every ten Hispanic men (10.4 percent) in the age group 20-29 is either in prison or jail, or on probation or parole, while almost one in four (23 percent) Black males in the same age group is participating in the criminal justice system on a given day. For White men, the ratio is considerably lower—one in 16 (or 6.2 percent). Austin, *supra* note 8, at 2.

153. Austin, *supra* note 8, at 2.

154. *See, e.g.*, Gregory Cerio, *Did Gates Get the Message?*, NEWSWEEK, Dec. 30, 1991, at 44; Maria Newman, *Victim of Bias Attack, 14, Wrestles With His Anger*, N.Y. TIMES, Jan. 9, 1992, at A1.

155. *See* Matthew Cooper & Darian Friedman, *Governor Duke?*, U.S. NEWS & WORLD REP., Nov. 4, 1991, at 42.

The disproportionate number of minorities in poverty, however, seems likely to persist. Further, the high number of impoverished minorities will continue to distort racial issues. The probable economic hardships and workforce changes will hit minorities more severely than Whites. The cycle of poverty will continue to draw disproportionate numbers of minorities into the criminal justice system. Economic strain exacerbates cultural and ethnic disputes, and the result may be an irreconcilable polarization of separate groups. Instead of striving toward cooperation and an integration of diversity, groups may choose the protection of self-interest.[156]

As the minority population increases, so to will the number of minorities involved in law and politics. Until minorities feel they have attained equality, however, disputes will remain over methods that attempt to correct the inequality problem. With the demography of society in transition, emotions tied to racial and ethnic issues will be hard pressed as ever to remain non-violent.

The courts themselves are not well-prepared for the social diversity of the future. Dealing with group conflict will be expected, but the credibility of the justice system hinges on its ability to be accepted by the growing numbers of minorities. These groups may demand that the courts in both rulings and makeup reflect a more contemporary reality. The judiciary has always been able to couch itself as being independent of the will of citizens, and many of its principles are dependent upon that status. But society's failure to equalize rights and opportunities for all citizens will result in courts sharing in the backlash of reform, perhaps to the point where fundamental judicial principles are lost.

IV. HEALTH AND AGING ISSUES

Throughout the 1980s and into the 1990s, health concerns have become more important to Americans. People are changing their lifestyles in an attempt to become healthier. Further, medical technology has remained one of the most dynamic fields for invention and discovery, and at the current rate medical knowledge is doubling every eight years.[157] Medical technology will create new opportunities to extend the length of life over the next thirty years.[158] These advances, however, will outpace answers to the legal and moral questions accompanying the new discoveries.[159] One result of these advances will be a population that lives longer.[160] The other dynamic transformations that will accompany such advances may result in disputes which have significant impact upon courts.

156. *See* John Schwartz, *A Screenful of Venom*, NEWSWEEK, Nov. 4, 1991, at 48.

157. CETRON & DAVIES, *supra* note 1, at 365.

158. *Id.* at 371.

159. *Id.* at 346. *See* Morrow, *supra* note 83, at 56.

160. *See* CETRON & DAVIES, *supra* note 1, at 373.

A. *Health*

Developing technology will open new healthcare possibilities. However, technology will not be able to respond quickly enough to the growing dilemmas of AIDS and mental illness. While AIDS will continue to be one of the most publicly debated health care concerns, there will be growing anxiety about mental health as economic hardship forces the mentally ill onto the streets. The cost of these medical advances and health treatments will be borne by all, exerting economic stresses upon society.

Medical advances will offer startling opportunities for better health, but will be accompanied by ethical concerns. For example, human reproduction will undergo drastic changes, creating ambiguities about the definition of "parenthood."[161] Sexual intercourse is no longer necessary for reproduction, due to technology-mediated reproduction, prenatal diagnosis, genetic intervention, sex pre-selection and commercialization of human reproduction.[162] However, along with these advances come ethical questions about the possibility of having genetically designed children.[163]

Other probable advances include artificial blood, human growth hormones, memory-recall drugs and newborns with particular disease immunities.[164] Medical advances will include artificial body parts.[165] Elimination of a great deal of exploratory surgery will occur through computer-based imaging tools which provide cross-sections of soft and hard tissues.[166] Laser surgery will decrease patient trauma and the length of hospital stays, thus lowering some medical costs.[167] Experimental brain cell transplants may soon be available to aid victims of retardation and head trauma.[168] An injured heart may be repaired by using muscles from other parts of the body.[169] We can expect development of better bionic limbs and hearts, drugs that prevent disease and

161. Philip Elmer-Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56, 58. A number of bizarre court cases have cropped up as a result of ambiguities in the rules governing new technologies. In one peculiar case, a wealthy couple died in a plane accident, leaving two frozen embryos as the couple's only direct heirs. A court decided that the embryos could not inherit the estate. In a case that is still pending a divorced Tennessee couple is battling over whether the woman has the right to make use of frozen embryos created while the couple was still married. *Id.* at 63.

162. ROBERT H. BLANK, REGULATING REPRODUCTION 6-9 (1990).

163. Shannon Brownlee & Joanne Silberner, *The Age of Genes*, U.S. NEWS & WORLD REP., Nov. 4, 1991, at 64, 76.

> Society's knotty decisions will become even more tangled as the massive Human Genome Project lumbers toward its goal of mapping the location of every human gene, including those that govern such traits as intelligence, coordination and grace. That knowledge will expand the potential of genetic engineering far beyond the correction of disease and push it toward the realm of social engineering.

Id. at 76.

164. CETRON & DAVIES, *supra* note 1, at 346.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

body monitors that are able to warn of trouble.[170]

It is estimated that more than 100 billion dollars will be spent before the next decade on genetic engineering.[171] Common medical practice may include replacing defective genes with healthy substitutes.[172] "By the year 2010, every family will probably have a member who has undergone such a treatment."[173] It is possible that the day will come when as much as fifty percent of a human body contains technological implants.[174] One result of technology is that people are being forced to explicitly define their values. Ultimately, this forced awareness may help society better clarify its resolutions and beliefs.

In recent decades infectious diseases caused only one percent of deaths in people over the age of seventy-five, although that percentage may be affected by the AIDS virus.[175] Chronic and degenerative diseased patients are generally what fill hospitals.[176] Most common diseases are multifactorial due to a combination of internal and external causes.[177] Future technological developments may identify 80-100 different disease-predisposing genes by testing one sample from an individual.[178]

Health goals at the beginning of this century were oriented towards avoiding epidemic disease, escaping tuberculosis and living to age sixty-five.[179] We have a vastly different perspective in the 1990s, where reaching age eighty-five can be a goal for most people and infectious diseases are largely controlled.[180] We now must struggle against epidemic disease generated by lifestyle, such as coronary heart disease and lung cancer.[181]

AIDS will remain a national concern. By the year 2000, $50 billion will be spent on AIDS research and treatment. By the turn of the century, every taxpayer will pay $500 a year to care for AIDS patients.[182] It is estimated that ten million people worldwide are infected with the human immunodeficiency virus (HIV) that causes AIDS.[183] Scientists agree that a cure or vaccine for AIDS is at least five years away, although drugs like AZT and genetic-engineering techniques provide some hope.[184] Within that time span it is estimated that over 175,000 people

170. *Id.*
171. *Id.* at 346.
172. *See Outlook '90*, THE FUTURIST, May-June 1989, at 57.
173. *Id.*
174. *Id.*
175. P. A. Baird, *Genetics and Health Care: A Paradigm Shift*, 33 PERSPECTIVES IN BIO. AND MED. 203, 205 (1990).
176. *Id.*
177. *Id.* at 206.
178. *Id.* at 208.
179. *Id.*
180. *Id.*
181. *Id.*
182. CETRON & DAVIES, *supra* note 1, at 367.
183. Jerry Adler, *Living With the Virus*, NEWSWEEK, Nov. 18, 1991, at 63.
184. SUZANNE LEVERT, AIDS IN SEARCH OF A KILLER 128 (1987).

will die from AIDS related infections.[185] AIDS has already polarized people's opinions because of its association with homosexuals and intravenous drug users. As the disease crosses into the lives of heterosexuals and the mainstream, the ignorance and helplessness of many people will raise tensions in society.[186]

Mental illness will also be a concern. Discontinued funding of public mental health services was a significant cause of the rise in homelessness during the 1980s.[187] Colorado's former director of the Department of Institutions estimated that half of the state's homeless were mentally ill and displaced from institutions because of budget cuts.[188] The inability of the mentally ill to care for themselves and the reluctance of most insurance companies to cover mental health claims suggests that more homelessness resulting from mental illness may occur in the future.[189] Another concern is the impact that growing numbers of elderly will have on mental health services. Forecasts of an aging population will bring along an increase in mentally ill senior citizens.[190]

The rising cost of health services is an issue that will impact all citizens. Health care cost $685 billion in 1990, up from $618 billion in 1989 and $559 billion in 1988.[191] After adjusting for inflation, health care expenditures have risen since 1950 at annual rates of 5.5% overall and 4.1% per capita. Since 1950 the personal health care proportion of GNP has nearly tripled and total health care is forecasted to reach fifteen percent of GNP by the year 2000.[192] Although health care costs will hinder families by a reducing their disposable income, businesses may be most stymied by these costs, where the burden of health benefits is noticeably sapping profits and prohibiting expansion.[193] Concern about rising costs have brought about calls for massive reform of the medical industry, but it is unlikely that the cost of expensive health services can be dramatically reduced.[194] Suggestions for reducing costs include rationing to those who are either insured or able to pay for

185. *Id.*

186. Adler, *supra* note 183, at 64. "It is a disease that lends itself to proselytizing, both because it is so easily prevented and the needs of its sufferers are so great." *Id.*

187. RAEL JEAN ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS 1-4 (1990).

188. Henry Solano, *Vision 2020: Colorado Courts of the Future, "Aging, Health & Homeless Subgroup Report 2* (Apr. 11, 1991).

189. Geoffrey Cowley, *Money Madness*, NEWSWEEK, Nov. 4, 1991, at 50. The welfare of patients is being eclipsed by marketplace incentives and pressures. Says the former president of the American Psychiatry Association, "it is *the* major issue in psychiatric care today. Psychiatric standards are on a slippery slope as hospitals try to survive." *Id.*

190. Ann Schrader, *Mental Health Crisis Foreseen for Growing Elderly Class*, DENV. POST, Dec. 4, 1991, at 5B.

191. National health expenditures have increased steadily at an average rate of 11.5 percent annually since 1970, during which time health care, as a percent of GNP, increased from 7.4 percent to 11.1 percent. Kirchner, *supra* note 46, at 20.

192. Henry Aaron & William B. Schwartz, *Rationing Health Care: The Choice Before Us*, 247 SCIENCE 418 (1990). The Congressional Budget Office estimates that the percentage of the federal budget spent on health care, which stood at 10.5 percent in 1980, will rise to almost 20 percent by 1996. *Id.*

193. Frieden, *supra* note 46, at 38.

194. *Id.*

services.[195] However, while many see rationing as a necessary and logical step, the issue may likely invite litigation of discrimination and inequality disputes.

Impact Upon the Courts. The most important issue for the courts is that medical advances will become reality before the legal and ethical implications have been considered.[196] Accompanying technological advances will be legal questions concerning how to equitably distribute medical capabilities as well as when to terminate extraordinary life-support efforts. Society has become increasingly dissatisfied with letting courts decide the answers. The judiciary has functioned independently in large part because the vast majority of citizens have never had reason to question it. The courts enforced what were essentially common laws. But as people see technology making miracles possible, they will not be satisfied with courts deciding the legality of certain treatments, especially if a particular ruling violates deeply held moral beliefs.[197]

Individuals denied treatment for any number of reasons will turn to the courts and fight discrimination suits.[198] Moreover, disputes will arise over insurers refusing to pay for treatments.[199] Insurers, trying to avoid the costs associated with new technology in health care, will expand the definition of "experimental treatment," which is usually not covered.[200]

Growing concern over AIDS will also bring about disputes over the allocation and approval of treatments. The courts will have to deal with

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195. *Id.* at 63. "It comes down to a fundamental issue of health care rationing in the minds of those who feel experimental treatments should not be underwritten by private industry." Jeffrey L. Lenow & Stephan Quentzel, *Experimental Treatment: Who Pays?*, BUS. & HEALTH, Oct. 1991, at 104.

196. *See* Morrow, *supra* note 83, at 56; Thomas H. Murray, *Ethical Issues in Human Genome Research*, 5 THE FASEB J. 55, 58 (1991).

197. *See* Elmer-Dewitt, *supra* note 162, at 58.

> The new techniques have also given birth to once unimaginable ethical dilemmas. Do sperm and egg donors have a claim on their biological offspring, and vice versa? Do embryos, frozen or thawed, have a constitutional right to life? How much manipulation of genetic material will society be willing to permit?

Id.

198. Brownlee & Silberner, *supra* note 164, at 66. There is concern that because of genetic advances health insurers, employers and the governments will gain access to genetic information and unfairly discriminate against people on the basis of their genes.

> [Twenty] percent of companies already use genetic tests on employees, in part to hold down corporate health-care costs. In addition, 15 percent of 400 employers surveyed by an insurer intend to screen prospective employees' dependents. While such practices may make economic sense, ethicists worry that they are discriminatory, particularly since genetic traits often cannot predict with certainty if or when their bearer will fall ill.

Id.

199. *See* Kirchner, *supra* note 46, at 20.

200. Lenow & Quentzel, *supra* note 196, at 104.

> It comes down to a fundamental issue of health care rationing in the minds of those who feel experimental treatments should not be underwritten by private industry. . . .It's likely that employers will see increased sophistication on the part of insurers with regard to experimental and investigational language, and to formulating strategies so as to strengthen their position when they choose to deny certain benefits.

Id. at 104-05.

cases concerning the rights of HIV or AIDS inflicted people who are discriminated against. There will be an increase in incidences of crime as well as the fear of AIDS results in violence, both by and against people infected.[201] The courts will hear civil and criminal claims by people who unknowingly acquire the virus from an infected person. Other disputes will arise because of abuses in mental health institutions and services.[202]

The rising costs of health care will multiply disputes and litigation as individuals, businesses and insurers struggle to deal with the burden of paying these costs.[203] Individuals will use the courts to demand insurance coverage, while employers and insurers attempt to limit their coverage obligations. As many as seventy million Americans lacked health insurance at some point during 1991.[204]

The fear of medical malpractice will continue to raise health care costs and create additional second level issues and disputes.[205] Doctors fearing malpractice suits for improper diagnoses may use unnecessary technology and tests to ensure safety.[206] Insurers subjected to the added costs and individuals subjected to the unnecessary tests will use the courts to individually litigate their disputes. Health care reformists will continue to attack the costs of malpractice suits and will press for changes in the litigation of those cases.[207] Further, many believe that the health care business supports itself with inappropriate and unnecessary use of expensive technology.[208]

B. *Aging Population*

One of the most direct results of the advances in medicine is the

201. James N. Baker, *Battling the Bias*, NEWSWEEK, Nov. 25, 1991, at 25. A man infected with AIDS was arrested in Cincinnati, and claims that he was beaten by county corrections officers. The officers say the man intentionally spewed blood from a nosebleed on four people. The man is scheduled to stand trial for attempted murder with the AIDS virus. The increasing violence against gays may be caused by mounting fear and anger over the spread of AIDS. Monitoring incidents in six major cities showed that bias crimes against homosexuals jumped by 42 percent between 1989 and 1990. *Id.*

202. Geoffrey Cowley, *supra* note 189, at 50, 51. In response to shrinking allocation of insurance dollars to mental health claims, some private psychiatric hospital have resorted to kidnapping patients and holding them against their will in order to extract higher fees. *Id.*

203. "The welfare of patients is being eclipsed by marketplace incentives and pressures. . .[h]ospitals are trying to make money. Employers are trying to save money. In that tug of war, all sorts of extremes have happened." *Id.*

204. *See* Frieden, *supra* note 46, at 38.

205. *Id.* at 65. According to American Medical Association estimates, medical malpractice costs add an extra $3 billion to the nation's health care bill. *Id.*

206. The high cost of medical malpractice is one of the more visible contributors to the high cost of medical care, both in terms of expensive malpractice insurance premiums—the cost of which physicians must pass on to payers—and the amount of 'defensive medicine' performed in case of a possible lawsuit.

Id.

207. "Most health care reformers address medical malpractice issues in their proposals, largely through suggestions for reform of the tort system. The most common suggestions by far include increasing the use of alternative dispute resolution techniques." *Id.*

208. "Forty percent of the annual rise in total health care costs come from the use, misuse and overuse of high tech treatments." Kirchner, *supra* note 46, at 20.

trend of an aging population. By 2020, seventeen percent of the national population will be over sixty-five and the number of people over eighty-five will have doubled.[209] By 2010, 38-44 million people will be sixty-five or over.[210] By 2020, the number of people in this age bracket will have increased to 49-58 million, having a significant impact on the resources of the Social Security Administration.[211] The number of Americans over age seventy-five will grow by almost thirty-five percent by the year 2000, greatly increasing the numbers who are physically and mentally disabled.[212] Growing numbers of elderly will also have an impact upon the workforce. Businesses will offer older workers and retirees flexible work schedules and retirement options to reverse the trend of early retirement and retain skilled laborers.[213] Companies will recognize the need to provide more "eldercare" benefits—similar to childcare benefits—to assist those who must care for older relatives.[214]

The aging population will also create shifts in the economy. Traditionally, the prime working age population has been between ages twenty-five and forty-four. This group makes up the majority of workers and first-time home buyers and also provides the bulk of resources needed to supply services to the young and elderly.[215] Although the percentage of people in this age bracket will remain stable over the next fifteen years, after 2005 they will drop as a share of total population.[216] By 2010, only forty-one percent of the population will be between the ages of twenty-five and forty-four, and this number will continue to drop.[217] Families already under economic stress will be further taxed by the need to support their elderly parents, creating a "sandwich generation."

Accompanying those pressures are concerns about the economic security of seniors. There are doubts about Social Security and its resources and a developing problem with pension funds.[218] Even if pensions and Social Security are healthy, most fixed-income seniors will live on significantly less than what they earned while employed, forcing many below the poverty level.[219] Health care costs will further reduce

209. By 2000, 20 percent of the state's population will be over 55 compared with 17 percent today. By 2015 this percentage will have risen to 29 percent, caused by a dramatic surge of baby boomers entering their sixties. Kendall, *supra* note 29, at 1.

210. *See* ROBERT E. KENNEDY, JR., LIFE CHOICES 129 (1986).

211. *Id.* at 129, 131 & 133.

212. *See Outlook '90*, *supra* note 113, at 39.

213. *Id.*

214. *See* Miller & Tsiantar, *supra* note 104, at 49.

215. Kendall, *supra* note 29, at 2.

216. *Id.*

217. *Id.*

218. *See* Schwartz, *The Grasshopper and the Ant: A Retirement Fable*, AM. DEMOGRAPHICS, Mar. 1991, at 9, 10. Only 23 percent of baby boomers (aged 26 to 44) have a secure feeling about Social Security. *See* Levinson, *Retire or Bust*, NEWSWEEK, Nov. 25, 1991, at 50. The instability of the Pension Benefit Guaranty Corporation, the federal agency that insures the pensions of 40 million workers, is growing into an "S&L-type" dilemma. *Id.*

219. *See* John Tull, *Meeting the Future Need for Legal Services By the Elderly Population. Can We Do It?* (paper prepared for AARP Conference, Nov. 1989), at 2.

the availability of discretionary income for the older population.[220] These trends signal a dramatic increase in the indigent elderly, especially among minority women.[221]

Impact Upon the Courts. If seniors are faced with serious financial hardships, funding may become scarce for government services, including the judicial system. The growing class of seniors is becoming more organized as a political lobby, and elderly citizens are asserting their rights in court.[222] A collapse of financial security for such a significant portion of the population would greatly increase social unrest.

Although the elderly are less likely to commit violent crimes, family cases and other disputes brought in response to mentally ill seniors should be expected. Other conflicts regarding living wills, prenuptial agreements, the independence of the elderly and the regulation and supervision of nursing homes, mortuaries and cemeteries are all issues that will continue to be disputed in court as the percentage of seniors grows. Increases in probate and estate cases and serious traffic violations are also anticipated.[223] Divorce and the potential loss of home, retirement money, pension plans and medical plans will continue to be meaningful issues with implications unique to the aged. In addition, the elderly will need the protection of the courts from economic fraud and physical abuse.[224] Seniors may also bring about changes in the courts themselves, with calls for more accessible courthouses and simplified legal processes.

V. ENVIRONMENTAL ISSUES

Environmental issues will be of great interest to society in the next 30 years.[225] Futurists predict that activist baby boomers will call for corrections of major environmental problems such as air pollution, acid rain, loss of forests, depletion of the ozone layer, global climate change, toxic chemicals in food and water, soil erosion, extinction of species and pollution of beaches, oceans, reservoirs and waterways.[226] Potential responses could affect the restructuring of many aspects of society.[227]

220. *Id.*

221. Paul Saffo, *Institute for the Future, The Family in the Future, Families in Court: A National Symposium, National Council of Juvenile and Family Court Judges* (1989).

222. Katrine Ames, et al. *Grandma Goes to Court*, NEWSWEEK, Dec. 2, 1991, at 67.

223. The youngest (aged 16 to 24) and oldest (aged 65 and older) drivers have the highest rankings for fatalities, accidents and costs to insurance companies per mile driven. Because they are more frail, older drivers also suffer more than younger drivers when they are involved in an accident. Dan Fost, *Who's Too Old to Drive*, AM. DEMOGRAPHICS, Sept. 1991, at 8.

224. *See* Hilary Stout, *God Send for Many, Home-Care Industry Also Has Potential for Fraud and Abuse*, WALL ST. J., Nov. 21, 1991, at B1. The burgeoning home health-care industry that services many seniors also has been the vehicle for physical assault, theft and fraud. *Id.*

225. Ehrlich, *supra* note 5, at 154.

226. CETRON & DAVIES, *supra* note 1, at 367.

227. Sharon Begley, *Bring Back the Ozone Layer!*, NEWSWEEK, Nov. 4, 1991, at 49. The EPA predicts that UV-induced cataracts and skin cancer will cause an extra 12 million cancer cases among Americans over the next 50 years. Already skin cancer rates have doubled since 1980. *Id.*

As businesses respond to increased regulation and vocal consumer demand with environmentally helpful practices, economic growth may be stagnated.[228] Over the next ten to fifteen years, business will go through the expensive process of conforming their activities to government standards. Were this the only effect of environmental issues upon the future it would still be significant. The huge cost of environmental regulations upon corporations was a contributing factor to the late '80s recession. It is well argued that corporations should make their practices environmentally sound. Doing so, however, will present significant social costs, which may cause people to lose sight of the need to immediately address environmental issues. Although popular spirit is currently high for protecting the environment, as the economy continues to suffer, many may find their ideological preference for a healthy Earth incompatible with their immediate economic needs. Inevitably, this tension between a profit-based economy and a sound environment will be balanced by the courts. Regardless, the impact of environmental issues upon the economy will accompany the economic concerns created by the trends in health and labor, and exacerbate the potential for societal tension and increasing poverty.

At the state and local level, environmental conflicts will exist between those who want to preserve natural resources and those who wish to use them for leisure, manufacturing products and creating jobs.[229] As economic trends affect more individuals and communities, calls for short term economic solutions will be pitted against long term environmental issues. State economies, more dependent upon their fragile ecosystems than the nation as a whole, will be hit first if environmental mismanagement comes to bear. Between now and the year 2020, state law makers will respond to citizens demanding environmental rights with legislation intended to safeguard the depletion of the earth's resources. Federal regulatory agencies will also make additional rules, as they seek to enforce a safe and clean environment.[230]

The environmental doom forecasters have clearly outlined the effects of environmentally destructive practices. There also remains the possibility that the harmful practices of past generations will begin to show their effects within the next thirty years.[231] If this is true, the grumbling from profit-stymied industries will be faint compared to that of the rest of society suffering life under various collapses of the ecosystem.[232] Although the Government has practice in cleaning up a few

228. Thomas, *supra* note 116, at 25. Much of the economic growth of the 1980s was spent on the environment, rather than on wages. *Id.*

229. Michael Satchell, *Any Color But Green*, U.S. NEWS & WORLD REP., Oct. 21, 1991, at 74-76.

230. *See* Eugene Linden, *Hot Air at the Earth Summit?*, TIME, Nov. 4, 1991, at 77. Many conservationists believe the prospect of lost opportunities in the global marketplace will persuade the Bush Administration to be more forthcoming in initiating environmental legislation. *Id.*

231. Begley, *supra* note 227, at 49.

232. Brook Larmer, *Life Under the Ozone Hole*, NEWSWEEK, Dec. 9. 1991, at 43.

man-made spills, it has no experience combating irreversible, large scale environmental damage.

Current popular opinion is strong enough to inspire measures to deal with these potential disasters, and the courts will be the forum in which to enforce these measures. However, with so many other immediate, albeit short-term, issues becoming prominent over the next fifteen years, the potential exists that environment concerns will not remain a priority.[233]

Impact Upon the Courts. In addition to handling specific environmental cases, the courts will be affected by increased concern and debate over environmental regulation.[234] As this topic becomes more prominent, the courts can expect an increase in disputes.[235] When consumer demand increases and natural resources are depleted, courts will be asked to address a number of environmental issues concerning our air, water, topsoil and waste as well as deforestation and negligent land use.

Environmental disputes could stretch beyond state and national boundaries.[236] Many may need to be addressed on a global, multilateral basis. In addition, dangers in the industrial environment will compel review of environmental law in the context of personal injury and public and corporate responsibility. People physically or economically hurt by environmental mismanagement will use the courts to redress that harm. Governments and businesses will be held liable for unsafe work or school environments. These increased demands may bring about a need for specialized, regionally-based environmental courts.

The multi-jurisdictional nature of these issues will create more federal regulatory agency involvement in environmental matters. Federal agencies will enforce safeguards for a clean and safe environment. State courts will have the responsibility to determine rights to local resources. Colorado's water courts, which resolve property disputes over water rights in the state, are a good example. At the state and local level disputes may also arise over land use. In Colorado, the recreational use of land is creating conflicts between hunters and wilderness advocates, and snowmobilers and cross-country skiers. Since there will be less land per person as the population increases, future land use disputes could include zoning, housing and transportation conflicts as well as disagreement over the long term use of pesticides for cultivation and the recreational use of land.

233. Stephen Budiansky, *The Ultimate Security Risk*, U.S. NEWS & WORLD REP., Feb. 17, 1992, at 6.

234. *Id.*

235. Frank E. Allen, *Few Big Firms Get Jail Time for Polluting*, WALL ST. J., Dec. 9, 1991, at B1. For fiscal 1991, the Environmental Protection Agency had 125 indictments, 72 convictions and $14.1 million in fines. Convicted defendants served prison terms totaling 550 months, an increase of 121 percent from the prior fiscal year. However, the article cites concern that smaller companies are much more likely to receive jail time for polluting than big firms. Only nine percent of large-company offenders had any of their people sent to jail, while 25 percent of small companies had people ordered to serve time. *Id.*

236. Linden, *supra* note 230, at 77.

VI. Conclusion

Futurists suggest there are a number of ways in which the future could unfold. While social and demographic trends may seem to lead to a distinct destination, unforseen events can always alter that course. Regardless of that possibility, important future trends must be identified. By studying changes in society, futurists can paint a portrait of what the future may consist.

The question arises, however, why plan for change? Courts have survived social change throughout history. If Thomas Jefferson stepped into a courtroom today, the settings would not seem unfamiliar.[237] The physical structure of a courtroom is much the same as are the rules of evidence and the adjudicative process. It would seem that knowing and understanding the implications of future trends upon the courts would be helpful, but hardly essential information.

The importance of future social trends is tied to accepting the need to plan for the courts. If it is accepted that the judiciary's responsibility is to be affordable, accessible and responsive to the needs of the public, then it is essential that courts plan because their ability to perform these functions will face significant obstacles in the years ahead.

237. Judge John J. Daffron, Virginia Superior Court, in speech given to members of "Vision 2020: Colorado Courts of the Future," January 18, 1991.

A DAY IN THE LIFE OF S. BRECKINRIDGE TUSHINGHAM

as recorded by ERIK M. JENSEN*

The law school building had been riddled with gunfire. Bodies lay in disarray, their arms and legs horribly distended. Hungry buzzards circled overhead.

While you catch your breath, let me assure you that the first paragraph has nothing to do with the rest of this work. The language, which would have made even Bulwer-Lytton gag, is a come-on. It does nothing more than alert you to the fictional nature of our journey and to my long-term goal: to be the Robert B. Parker of law reviews.

Law reviews have always printed a lot of fiction, hidden among the "with respect to's" and "take account of's."[1] But in the past, little of the stuff met FTC labelling standards. Now the pretense is gone. Everyone's telling stories, often short ones that must have been dashed off on a long weekend.[2]

If everybody else is getting away with emoting in legal journals and books—publishing fabricated life stories as scholarship[3] and beefing up simple points with extended dialogue—hey! I want to jump on the bandwagon before the wheels fall off. I can "hear the call of stories" as well as anyone.[4] (In fact, I hear one now.)

I haven't been to prison yet,[5] but there ought to be a place for stories from WASPs with no arrest records, too. And I'm willing to drop an occasional footnote so that this will look sufficiently law-reviewish for the purists.[6]

My name is Samuel Breckinridge Tushingham, "Breck" for short. (It had to be something for short, and one of the alternatives was far

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1. At *The New Yorker*, law review prose is valued for its elegance—further evidence of that once great journal's decline. *See Briefly Noted*, THE NEW YORKER, Oct. 21, 1991, at 134 (reviewing STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991)) ("The author . . . writes like a law professor, constructing tight arguments whose precision offers aesthetic as well as intellectual pleasure.").

2. *See* Arthur Austin, *The Waste Land*, 1991 B.Y.U. L. REV. 1229, 1241 ("the new fad of storytelling was the newest scam in legal scholarship"). Naturally, the quoted line appears in a story.

3. *Cf.* AMANDA CROSS, THE PLAYERS COME AGAIN 228 (1990) ("It doesn't have to be the truth, just your vision of it, written down . . . .").

4. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

5. *See* Mumia Abu-Jamal, *Teetering on the Brink: Between Life and Death*, 100 YALE L.J. 993 (1991) (essay by death row inmate); Joseph M. Giarratano, *"To the Best of Our Knowledge, We Have Never Been Wrong": Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005 (1991) (essay by death row inmate).

6. *See supra* notes 1-5 and *infra* notes 7-34.

worse.)[7] My bloodlines are good. Some of my ancestors came over on the Mayflower, heaving their guts out along the way. They could have formed chapters of Great-Great-Great-Grandfathers and grandmothers of the American Revolution, if only they'd had a better idea of what was to follow.

I was once a lawyer, and you know how that can be. Or, if you don't, consider yourself blessed. One 500-page set of lease documents too many became my designated driver, and I hit the road to drink. I was regularly crashing parties of the first, second and third parts, and my eyeballs glowed in the dark. My life, like my drinks, was on the rocks.

Therefore, be it resolved—like alcohol, some words get in the blood—I began to think of other pursuits. Why not law teaching? I know I'm supposed to care about the life of the mind and all that, and I would like to be a real academic—maybe a history professor or something—but that isn't going to happen.

Besides, law teaching has its special attractions. Law professors get paid real money; their take per hour approaches Michael Milken's. In addition, to salve their consciences, they can make contributions to the starving historians' fund.[8]

An academic job was attractive, too, because I remember my own law school teachers' lifestyle. I never understood how our tuition could be so high when the school had no overhead costs. Every office light seemed to be off by 3 p.m., and the electricity consumption on weekends wouldn't have powered Pin Point, Georgia, for a minute.

This is starting to sound as if I care only about money and free time, and that's not true. Another factor drew me to law teaching: law professors hate lawyers. Where else but in a law school could I be paid to do what I'd do for free: dump on the people I despise?

Anyway, I wanted a new job, so I went to the annual "meat market" run by the Association of American Law Schools. On two dreary November days in 1989, a Washington hotel was filled with law professors on expense accounts and us would-be academics paying our own expenses. I marched from interview room to interview room, drinking beer and acting as if I cared about the clinical programs and building projects at a zillion schools.

My wit and charm paid off. (What else could it have been? I'm a white male, remember, and I haven't yet disclosed any out-of-the-ordi-

7. *Cf.* F.T.S. Assoc. v. Commissioner, 58 T.C. 207 (1972), *acq.* 1972-2 C.B. 2 (collapsible corporation formed to develop and sell disposable toothbrush called "Tush").

8. Of course, law professors don't really make contributions (or do anything else high-minded, for that matter). *But see 'What Did You Do During the 1960s, Daddy?'*, NEWSDAY, Sept. 4, 1988, Ideas section, at 3 (describing admission of Supreme Court nominee, Douglas Ginsberg, that he had smoked marijuana while a Harvard Law School professor). Just try getting them to agree that law school money should help support the history department. But a little hypocrisy is fine with me. I'm a believer in the suburban liberal principle that abstract whining is better than out-of-pocket cash flow any day.

nary sexual preferences.[9]) I was invited to visit half a dozen campuses for full day interviews. Scoff Law School was to be the first, and this is the record of my day there.[10]

The invitation from Scoff was welcome. I wanted to make sure that my first teaching job was at an institution good enough to satisfy my intellectual appetites. They weren't many—I was perfectly willing to go light on the heavy stuff—but I wanted *some* sustenance.

I had heard Scoff was an up-and-coming school. Yes, I heard it from the Scoff Law interviewing team, but I did hear it. And, you know, it's comforting to be at a place where everyone pats everyone else on the back, over and over. Almost every school in the country, except overrated Yale, tells itself it's underrated: "If only the rest of the world knew how good we really are," etc., etc. You've heard it before.

So I gratefully accepted Dean Dean's invitation, and I arrived in underrated Scoff on a blustery January Thursday when the city was under a blanket of snow. I had wanted to come on a Friday, which would have fit better into my work schedule. But Professor Leyser, the chairthing of the apparently genderless Appointments Committee, pulled no punches: "You should get here before we close down for the weekend. Monday or Tuesday would be best, but definitely don't come on Friday."

Thursday it was to be.

The dean picked me up at 7:30 at the Scoff airport. As we drove to the campus, he chatted about the local sports successes and about the weather. (What would people talk about if there were no weather? What do people talk about in San Diego?) I started to doze off until we began sliding precariously close to one car after another. As I sweated in the subzero temperatures, the dean joked about "slippery slopes."

When we pulled safely into the dean's parking space, I gave a silent prayer, which I tried to make as consistent as possible with constitutional principles. Kissing the ground was out of the question. I needed my mouth that day, and I couldn't afford to leave it on the frozen surface.

The law school building was not quite as imposing as I had hoped, but bricks and mortar can't substitute for good people. I later learned that good people—or bad people—can't substitute for bricks and mortar, either, but that's another story.[11]

Before my interviews began, the dean gave me a tour of the facility. He was trying to put the institution's best foot forward, and he wanted me to think that foot had never been touched by a loafer.

The cafeteria was one of the finer points in the building. "We try to

9. I'm thinking about it. How would anyone check? Hm-m-m-m, maybe I'd better think some more about this.

10. The names have been changed, but you know who you are. *But see infra* text accompanying note 34.

11. "Oh, good," I hear you say, "another one's in the works."

put our resources into those activities that generate the most student interest," the dean explained, "and we learned from a survey that students spend much more time eating than studying." The dean also told me, off the record,[12] that there used to be a separate faculty dining room, until the food fights got out of hand.

The cafeteria did have its pedagogical value—and not only because law is a seamless web, or a webless seam, or whatever. Among other things, it was used as a training ground for a course in restaurant law. Building on prior successes—desserts ranked tenth on the Gourman Report, and the pass rate on the salad bar exam was high—the dean hoped to develop an LL.M. program in the subject.

The dean was proud that the school's library had been compressed into one old classroom, with a storage closet serving as the "rare books room."[13] "With everything on machines, we need terminals, not books," he said. "The book is as outmoded as chivalry. Happily,"—here he laughed—"we have neither."

I grinned weakly. When I expressed some hesitancy at cramming western thought into a microchip,[14] the dean ridiculed my neanderthalish thinking. His jab to the ribs was gentle, but pointed: "Breck, I suppose you get some tactile pleasure from holding a book in your hands."

I do, of course. The Tushinghams raised me properly. Books are sacred. Do law professors read books?, I asked myself (and only myself).[15] I continued to smile in what I hoped was a noncommittal way. I was trying to get a job offer, after all, and I kept thinking about those 500-page lease documents.

As the time approached 9:15, the dean walked me to my first interview. On the way to the faculty wing of the building, we passed the moot court room, where a trial practice class was meeting. It may have been my imagination, but I swear strains of *Swan Lake* were wafting down the corridor. The trial lawyers-to-be must have been practicing their pirouettes at the barre.[16]

We also passed by the law school conference room, where raucous laughter poured through the transom. The dean told me that the faculty's Committee on Harassment was meeting to consider the ethnic jokes heard in the hallways during the preceding week. The dean expected the committee to issue a strong statement condemning such reprehensible behavior.

Just as we reached the faculty offices, I saw a blur and felt a gust of

12. So sue me, Mr. Dean.

13. The "room" contained one dusty set of Coke's *Commentaries* and the publications of the Scoff faculty, which are, I learned later in the day, rare indeed.

14. *Cf.* JOHN MORTIMER, RUMPOLE A LA CARTE 101 (1990) ("The library [at Gunster University] was another concrete block. We went up in a lift to a floor which hummed with word processors and computers and even had shelves of books available.").

15. I now know the answer to that question: No.

16. *Cf.* JOHN MORTIMER, RUMPOLE AND THE AGE OF MIRACLES 72 (Penguin ed. 1988) ("I have always found a knowledge of the law to be a positive disadvantage in a barrister's life. . . .").

wind. The dean laughed. "That's our newest faculty star, Professor Rush, a young scholar in Caribbean semiotics. We recruited him from Ottabia Law."

"Caribbean semiotics must be a fascinating subject," I replied, although I had no idea what a semiotic is and I could think of nothing Caribbean except Harry Belafonte. "I'd like to learn more about it," I added. "What has he written?"

"Well, nothing yet," replied the dean. "Great work can't be rushed, and we know he's working. You saw how fast he walked, Breck, and he was carrying a legal pad."

The pad was good recyclable white paper, too. The dean went on to explain his theory that the less a person has written, the more likely it is that the person has thought deeply about a subject. By that standard, Rush was an extremely thoughtful young man.

I must admit I wasn't convinced. I had recently read David Lodge's description of the once-promising Professor Masters.[17] And I remembered my first sergeant in the army, who walked around with a clipboard. No one ever saw him do anything with it, but he always looked ready for business. He probably still does.

But I suppose I was being unfair with those impure thoughts. Who was I to question Professor Rush's efforts? I was an academic neophyte, unaware of all the pressures facing intellectuals—such as getting out of bed in the morning (or afternoon).[18]

Ideas take time to germinate, and Rush was still wet behind his academic ears.[19] Ears dry slowly in the ivory tower climate. Rush had been teaching for only ten years, and during that decade he had only one sabbatical and a couple of research leaves. And summers are short, with all the yard work to do. The rest of the time Rush was burdened

17. '[Masters is] a great man, really, you know,' [Busby] said, with faint reproach.
'He is?' Morris [Zapp] panted.
'Well, he was. So I'm told. A brilliant young scholar before the war. Captured at Dunkirk, you know. One has to make allowances . . .'
'What has he published?'
'Nothing.'
'Nothing?'
'Nothing anybody's been able to discover. We had a student once, name of Boon, organized a bibliographical competition to find something [Masters] had published. Had students crawling all over the Library, but they drew a complete blank. Boon kept the prize.'

DAVID LODGE, CHANGING PLACES 89 (Penguin Books 1978) (1975).

18. Herbert Hoover was not always wrong: "I do not know of any other profession, or calling in the whole wide world where laziness and incapacity are wrapped up in the sacred garment of perpetual tenure." *Quoted in* Stuart Creighton Miller, 2 ACAD. QUESTIONS, 83, 85 (summer 1989) (reviewing GEORGE H. NASH, HERBERT HOOVER AND STANFORD UNIVERSITY (1988)). *See also* MICHAEL MALONE, FOOLSCAP 47 (1991):

Tenure was a choke hold whereby the faculty who grabbed it were never to be shaken loose unless so senile they couldn't locate their classrooms, or so depraved they debauched dogs in public. Short of those sins, the whole university had itself turned into one big sanctuary harboring the merely mad, the simply slothful, and the routinely immoral, ignorant, inept, obtuse, and inebriated.

19. Please excuse the mixed semaphores.

with classes; he had been left with only twenty or so hours per week to work on his multi-volume project.

I learned that the Scoff faculty was filled with scholars professing massive works-in-progress (hence the title "professor," I guess). The faculty's publication list for the prior year was short: Professor Dallas (about whom, more later) had several pieces in major reviews, and Professor Moot (ditto) had a couple of notes in the *Grazing Law Digest*. That was it. Nevertheless, one of these years, I'm sure, a publishing explosion will occur at Scoff. The Dead Sea Scrolls will be transcribed, too.[20]

But I digress (or do I?). Before getting caught in Rush's academic cyclone, the dean and I had been on our way to my first interview. At about 9:30, the dean introduced me to Professor Chips.

I had assumed that few members of the Scoff faculty would be willing to admit to no work-in-progress, but Chips, a student of law and appliances,[21] was refreshingly forthright: "Teaching is our *raison d'etre*—pardon my French. Writing articles wastes time that could be devoted to our students and to writing memos."

Professor Chips's enthusiasm was catching; I had hopes for a vigorous discussion of legal education's faults and strengths. Unfortunately, shortly after my arrival, he looked at his watch and gasped: "We should talk about this at length, but I'm afraid I don't have time now. I must run to the grocery store and then clean the house. Errands are just all-consuming, you know; I barely have time for my sauna. I do hope we'll see each other again."

Chips's departure left me with free time before my next appointment. Looking for excitement—or what passes for excitement in academe—I wandered toward the placement office.

I found more than a little activity. Students were demonstrating against an employer that was interviewing on campus. The employer had refused to follow the school's guidelines urging that hiring decisions be made without regard to students' academic records. "Reject Ableism" read one sign;[22] "Hire the Braindead" read another.

As I understood the students' position (and I confess I was unable to appreciate all the subtleties), thinking is Eurocentric, as well as male-centered.[23] I moved quickly past the demonstration, afraid that the stu-

20. Son of a gun. As I was writing this, it happened, sort of. *See* John Noble Wilford, *Monopoly Over Dead Sea Scrolls Is Ended*, N.Y. TIMES, Sept. 22, 1991, at 1, col. 3 (describing decision of Huntington Library to make available nearly complete set of photographs of scrolls).

21. *Cf.* JOHN KENNETH GALBRAITH, A TENURED PROFESSOR 50-51 (1990) (to avoid charges of "spread[ing] himself too thin," economics professor becomes world expert in refrigerator pricing).

22. *See* Smith College Office of Student Affairs, *Smith's New Guide for the Perplexed, reprinted in* 4 ACAD QUESTIONS 80, 81 (Spring 1991) ("ABLEISM:—oppression of the differently abled, by the temporarily able.").

23. *See* Perry Meisel, N.Y. TIMES, Aug. 5, 1990, § 7, at 25, col. 1 (reviewing SUSAN RUBIN SULEIMAN, SUBVERSIVE INTENT: GENDER, POLITICS, AND THE AVANT-GARDE (1990)) ("Feminist criticism, it appears, like feminist fiction, must be a kind of writing that refuses the straightforwardness of male writing, including its armory of values such as clarity, con-

dents might convince me on the merits.

At 10 o'clock, I climbed over piles of rubbish[24] to get into the office of Professor Oldham, student of Roman law, good food and fortified beverages—and a fine archeological specimen himself. Oldham fit the professorial role perfectly, rumpled and bursting at the seams.

Oldham's ample shirt showed a few dribbles of food, and it appeared to have once been very good food indeed. Wine spots also seemed to be vintage. "Uh-h-h-h, Breck, uh-h," Oldham began, "how was your—uh—trip—uh, uh—travel—uh, uh—junket—uh, uh—to Scoff?" My trip apparently reminded Oldham of some principle of canon law—it sounded to me like *lax lux lex et lox*[25]—and he discoursed at some length on that subject.

By the time Oldham had uttered two or three other questions about legal matters, the hour was up, and we had barely reached the tenth century A.D. The spread of the Danelaw was not yet finished.

I wanted to stay; the aroma of last night's repast was intoxicating. But Professor Oldham was insistent: "You must—uh, uh—get on—uh—with your shed—uh-h-h-h—yule."

To be fair to Oldham, I should note that the delay was not entirely his fault. We were interrupted twice during the hour by Professor Bolt. "Lightning" Bolt, a member of the faculty building and grounds committee, was performing his institutional service by checking for burned out bulbs. No light was burned out, either time.

And we were also interrupted by a deeply tanned guy in shorts and sandals, who came in looking for a cigarette. Professor Hunque (pronounced "hoon-kay") had just returned from the Virgin Islands. "Hunque's on sabbatical," Oldham informed me. (In the interests of conservation, I'll leave out the Oldhamic "uh's" this time.) "He's continuing his summer research on skin cancer, one of today's burning legal topics." Hunque and I briefly discussed the possibility of suing the Vatican for its failure to print warnings about the effects of sunshine.

At 11 a.m., I left as Oldham was filling in the "uh's" between "Good" and "by." I moved next door to the office of Professor Madonna, whose bookshelves were stocked with girlie magazines from the past forty years. He was working on a pornography study, which he told

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cision, and pointedness, all of which can be interpreted as masquerades for the male lust for power, replicating the structure of male sexual pleasure.").

24. One can learn a lot from piles in faculty offices, as Donald McCloskey has noted.

> Waiting in Gerschenkron's office for an interview one day a graduate student received from the nearest of numerous stacks of books and magazines a lesson in the scholarly life, the sort of lesson professors forget they give. The stack contained a book of plays in Greek, a book on non-Euclidean geometry, a book of chess problems, numerous statistical tomes, journals of literature and science, several historical works in various languages, and, at the bottom of it all, two feet deep, a well-worn copy of *Mad* magazine. Here was a scholar.

DONALD N. MCCLOSKEY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE 75 (1990). Oldham's piles taught different lessons, however, most having to do with municipal health codes.

25. I think it means "lazy lighted law on a bagel."

me, is likely to conclude that pornography is a good thing for society and is, in any event, a lot of fun for readers like him.

Madonna and I talked a lot about constitutional law. Madonna's knowledge of the details of post-1985 cases was profound. I expressed my admiration for someone who had immersed himself in the Constitution.

"The Constitution?" he replied, with a puzzled look. "Oh, yes. I read that in high school."

"But, but . . ." I tried to interject a word in favor of the Founding Fathers, to no avail. In Madonna's universe, nothing important happened before 1950.

"Who cares about history?" thundered Madonna. "We have a living Constitution, and most life forms, after all, have no interest in their past. Do you think the polliwog gives a damn about James Madison, Breck? Of course not! Nor do I." The good professor[26] paused. "Now *Dolley* Madison is another matter," he added with a knowing wink.

I questioned Madonna about legal publication: how would he go about getting his pornography study into print? He was not clear on many journal practices, having last published something in 1971. But that fact did not prevent him from trashing law reviews: "Student editors don't know what they're doing; they can't understand the subtleties of my arguments. If I were to send them something, it would be way over their heads."

The hour ran out before I could learn how Madonna planned to deal with his law review difficulties. Actually, I suppose I had already found out his plans, just not the official version. In any event, I escaped. Madonna waved goodby and pulled out a 1960s era *Penthouse* for closer study.

The appointments committee had arranged for me to visit a couple of classes during the day. At noon, I sat in on a professional responsibility session. The Scoff curriculum in professionalism was state-of-the-art, dealing with many questions that had previously been ignored in law school settings.

Because of Scoff's repudiation of the printed word, students had no reading assignments. Instead, they were required to watch *L.A. Law* and reruns of *Car 54, Where Are You?*, and to be prepared to discuss the ethical issues raised by each week's episodes.

This particular PR class considered an important, but understudied, issue—whether a lawyer should have sex with his or her clients.[27] Like any difficult question, this one seemed to have no clear answers. The

26. *Cf.* MAE WEST, GOODNESS HAD NOTHING TO DO WITH IT: THE AUTOBIOGRAPHY OF MAE WEST 156 (1959) (describing the movie, *Night After Night*, in which West responded to a hat check girl's exclamation—"Goodness, what beautiful diamonds!"—with the disclaimer, "Goodness had nothing to do with it, dearie."); *see also* Jack Mathews, *Movie Beginnings: First Came the Words*, L.A. TIMES, Dec. 1, 1987, § 6, at 7 (describing quote in more detail).

27. Study of the issue has been restricted to specialized areas of the law. *See, e.g.*,

students had obviously thought a great deal about sex, and their rapt expressions confirmed that they had brought their thinking caps to the classroom.

One student commented on the safety precautions that should be taken before lawyer-client sex. The instructor, Professor Reich, skillfully used those remarks to lead into a discussion of whether the lawyer, the client, or both have the responsibility to take protective measures.

Another student suggested that his participation in sex would depend on who the client is and on how many clients he has at the time. Still another pointed to the scheduling problems that could develop if some clients were singled out for special treatment: "I would refuse to keep my other clients waiting." Many raised questions about how time spent in sexual frolics should be billed.[28]

The discussion turned to whether lawyers might have affirmative obligations to engage in sex. If the "duty of client contact" ever is accepted, I have no doubt that Scoff will be known as its birthplace. But this question, too, is fraught with conceptual (and contraceptual) difficulties. For example, one student pointed out the extraordinary physical demands that might be made on a lawyer prosecuting a class action.

The "dialogue," as we academics say, was robust. Student hands were in the air throughout the hour. (Given the subject matter, that was probably the safest place for them to be.) The session ended when one student took the opportunity, to Professor Reich's obvious pleasure, to comment on the repressive American regime of the 1980s.

If I smoked, I would have wanted a cigarette after that class. Completely drained by 1 p.m., I was taken to the student happy hour (really a "happy day") for lunch. One good thing about happy hours is that you don't leave them drained.

It turned out that some of my afternoon appointments had been canceled. "Well, as I told you, Thursday is a down day," Chairthing Leyser reminded me. A few faculty had been dragooned into staying to talk with me, but their mood was not pleasant, to say the least.

At about two, I swayed into an office where Professors Moot and Jeffries were waiting impatiently. I had done my homework about Scoff Law, and I knew the questions to ask to show my interest in the school—or so I thought. Reading ten years of Scoff alumni publications and plugging "Scoff" into Nexis should have counted for something.

Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988).

28. *See* Kathy O'Malley & Dorothy Collin, *O'Malley & Collin Inc.*, CHI. TRIB., July 18, 1991, C28:

> Attorney Albert B. Friedman got bad news recently: The Illinois Appellate Court ruled that a female client whose divorce he handled didn't have to pay his full $15,500 bill because some of the time he billed her for was time the two of them spent having sex.... Attorney Albert B. Friedman got good news recently: He was appointed to the Illinois Supreme Court's Committee on Character and Fitness.

Query: If Mr. Friedman had engaged in group sexual activity, would he have billed several clients for the same time period?

I asked the two professors about the work of Scoff Professor Dallas, which I had read about in the *Wall Street Journal* and the *New York Times*. Dallas had developed a method to evaluate legal writings in terms of adverbial and adjectival density, and he was beginning to apply his analysis to the works of William Faulkner. Journalists were amazed, and amused, at Dallas's ingenuity.

"You must be proud to get that kind of exposure," I innocently suggested.

"Proud? It's an embarrassment to the school!" Moot roared. "What does this crap have to do with legal scholarship? Who cares what newspapers think, particularly about some southern cretin like Falconer? That idiot Dallas will probably start writing stories soon."

The temperature in the office had risen ten degrees. Moot continued: "Here! Look at this list of citations." He handed me a sheaf of papers with references to over 200 Wyoming court decisions in which his work on grazing law had been noted. "That represents real work."

"And you know what?" Moot wouldn't stop. "Dallas once *criticized* me for thinking like a lawyer! I consider that the highest compliment. Everything lawyers need to think about can be learned by studying grazing law. 'No more than 3.6 cows per acre may be grazed in Montana at elevations above 4,000 feet.' *That's* what law is all about."

I was impressed—I was embarrassed not to have boned up on Wyoming and Montana jurisprudence—but I expressed some surprise that a colleague's success could cause such a reaction. My remark was met with silence—a very loud silence.[29]

We exchanged a few more unpleasantries for the rest of the allotted time. When I left the Moot-Jeffries office near three, the stale hallway air felt like a mountain breeze (with nothing grazing in the vicinity).

Except for the student happy hour, which was still going on, the building seemed empty at 3 p.m. I would have been lost if the dean had not arrived to thank me for coming and to escort me to another class, this one in feminist jurisprudence.

When I commented on the quiet, the dean mumbled that the faculty was hooked up at home to every conceivable electronic research device. Working at home is as easy as working at the school building, he emphasized, and without the distractions. Sleeping at home, I noted mentally, is even easier.

Ordinarily there wouldn't have been a class taught so late in the day so late in the week—three o'clock on a Thursday afternoon, for heaven's sake—but student enthusiasm for alternative legal analysis required fitting a course like feminist jurisprudence in somewhere. Professor Taylor, an untenured woman, had been brought in from "LaLa Law," one of the California law schools, to teach the course.

I asked the dean whether the school required that feminist jurispru-

29. *See* A.N. WILSON, C.S. LEWIS: A BIOGRAPHY 181 (1990) ("There is nothing like worldly success on the part of one academic to make all the others hate him or her.").

dence be taught by a woman. "Of course," replied the dean. "Could a man possibly understand the female way of thinking?"

I responded that many of my old army buddies had the same doubts, without realizing that their thoughts were to become the wave of the future.

The dean must have been a good ol' boy at heart. He pulled me aside for a confession: "Don't tell anyone I said this,[30] Breck, but the trusts and estates slots were already filled, and we are under pressure to hire more women. They have to teach *something*, and if they want their little ghetto, it makes things easier for the rest of us." Professor Taylor was the only woman faculty member I saw at Scoff.

"Well, here's classroom A; go to it, boy."

Quite a few nasty glances were directed my piggish way as I entered the classroom.

The class hour was devoted (probably not the right verb to use) to evaluating the effect of sexual activity on the separation thesis.[31] What this seemed to mean was sex, sex, sex—and in graphic detail. I learned more about copulative verbs in that hour than I ever learned in high school English.

The name "Dworkin" was bandied about throughout the session. I hadn't realized old Ron had written on these topics,[32] and I certainly didn't recognize the usual Dworkinian language.

The f-word has apparently become a term of art, and it has lost something in translation. When I was an undergraduate, prowling Boston's Combat Zone, I paid good money to hear women use words like that on stage. Now the words come with no extra charge, but they're buried in a lot of sociological bafflegab. (And who's this guy, Herman Newdics, that everyone talks about?) The material was certainly presented in a clearer, more straightforward fashion in the Combat Zone.

In classroom A, I felt alone. These folks did speak in a different voice, and I wasn't convinced it was deeper.

When I left the classroom, I was really all alone, except for the custodian, Jim Adam. Lacking the protection of tenure, he had to stay no matter what, even on a Thursday afternoon.

I had been abandoned by the faculty, and I needed to get to the airport. After we had chatted for a while, Adam volunteered to take me: "No one is here to even know I'm gone."

Adam, it turned out, is an occasional scholar himself, one of the

30. *See supra* note 12.

31. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3 (1988) ("[w]omen are in some sense 'connected' to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and 'connecting' experience of heterosexual penetration . . .; the monthly experience of menstruation . . .; and the post-pregnancy experience of breast-feeding.").

32. I now know that he hasn't, at least not for public consumption. *Andrea* Dworkin has. *See, e.g.*, ANDREA DWORKIN, INTERCOURSE (1987).

army of humanities majors doomed to academic unemployment. On the way to the airport, he told me about his frustrating life in the law school. He had kept library discards and had built a substantial collection in the school basement. "I love books," he said, "and it's good to have someone to talk to about books and other serious matters. I miss that at the law school."

Nice guy. I promised Adam that I would read any draft articles that he sent me. I'm happy to report that, except for his failure to integrate the rich literature on grazing theory, Adam's two most recent pieces are first-rate.

And so I left Scoff and the Scoff Law School, never to return. Although I did get an offer from Scoff, I took a job at one of the institutions I visited later.[33] I'd like to say that I made my decision based on some grand principle, but money was the tipping factor. Grand principles canceled each other out. The other schools turned out to be exactly the same as Scoff Law.[34]

33. Therefore, I write from experience. *Cf.* Barbara Gamarekian, *Authors Muse on the Sense of Place*, N.Y. TIMES, Oct. 3, 1990, at C12 (quoting novelist-historian Shelby Foote: "[Faulkner] was a Southern writer because it was a place he grew up in and knew. Anything else would have required research, which was something he could not abide.").

34. *See supra* note 10.

FALUDI FIGHTS BACK: A REVIEW OF *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN*

MERLE H. WEINER*

Perhaps it is too much to say that Susan Faludi's *Backlash: The Undeclared War Against American Women*[1] is to the 1990s what Betty Friedan's *The Feminine Mystique*[2] was to the 1960s. Faludi's book probably will not revolutionize women to embark on a feminist journey; yet it does capture, as Friedan did, an unspoken truth about the interrelationship of society and its women. It is this naming the unnamed, as Friedan originally did, that makes Faludi's book well worth reading.[3]

The simplicity of Faludi's premise, that a backlash against women's rights and feminism is occurring, is both one of the book's strengths and one of its weaknesses. While Faludi amply demonstrates the existence of a "backlash," she never tells the reader how to reverse it. Instead, Faludi uses her four hundred-plus pages of text to provide a plethora of examples, merely establishing that an attack on women's equality exists. Faludi focuses primarily on popular culture for her support, finding material in the media, movies, television, fashion industry and cosmetic industry. She also documents her thesis by entering the domains of the new right community, politics and scholarly and popular writers. By the end of Faludi's book, one either is convinced of her premise by the sheer number of examples provided or feels exhausted enough to agree.[4]

Reading this Pulitzer prize-winning journalist's tome awakens one to the truth of its underlying message. One starts to see examples of the backlash everywhere. For example, a recent article by Sally Quinn states that feminism, like communism in the former Soviet Union, is dead: Feminism is "anti-male, anti-child, anti-family, anti-feminine," and

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1. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

2. BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

3. Faludi might wince at the comparison with Friedan. In discussing Friedan's THE SECOND STAGE, Faludi shows quite a bit of disdain for the author, calling her a "fallen leader," angered by her loss of power. FALUDI, *supra* note 1, at 322 (citing BETTY FRIEDAN, THE SECOND STAGE (1981)). Faludi accuses Friedan of "yanking out the stitches in her own handiwork," and Faludi calls THE SECOND STAGE a "thinly documented book that often reads as if it were dictated into a tape machine," muddled in both language and logic. *Id.* at 319, 321, 324.

4. While Faludi was awarded the National Book Critics Circle award for general nonfiction, some board members understandably felt, "(t)he writing was clunky and had too much filler." David Streitfeld, *Smiley, Roth Win Book Awards*, WASH. POST, Feb. 17, 1992, at D1.

therefore, has nothing to do with most women.[5] Feminism, Quinn asserts, outlasted its usefulness. Quinn accuses movement leaders of being hypocritical, of overlooking the "deepest, most fundamental needs of their constituency," such as women's need for men, children and creating a happy home atmosphere. She faults feminists' insensitivity to these needs as "creating a backlash" against abortion rights, earning power and job promotion in the workplace, and cites Faludi's book for support.

After reading *Backlash*, one recognizes that Quinn's message is twisted. It is an illustrative exercise to imagine how Faludi might address Quinn's argument. A technique that reappears throughout Faludi's book is her bombardment of the enemy (i.e., the reactionary forces) on all fronts. Faludi's tactics include revealing counter-examples, exposing methodological flaws, identifying personal short-comings and magnifying irony. This approach makes her book effective and characterizes her probable response to Quinn.

Apart from criticizing Quinn for citing her book out of context, Faludi would directly dispute the content of Quinn's message that feminism is no longer relevant to most women. Faludi, in fact, did challenge a similar claim when she discussed Sylvia Ann Hewlett's book, *A Lesser Life: The Myth of Women's Liberation in America*,[6] and its contention that the feminists failed women by ignoring motherhood. Faludi points out that most women do not share this belief: "When the Yankelovich pollsters in 1989 specifically asked, 'Is the women's movement antifamily?,' the vast majority of women, in every age group, said 'no.' "[7] Faludi also would indicate that Quinn gives no statistics or other evidence to support her claims regarding women's feelings about feminism.

Faludi then would detail how the women's movement, in fact, works to help women manage their often dual roles as mother and labor force participant. Faludi wrote, for example,

> In the early '70s, feminists campaigned for *five* day care bills in Congress. Three of the eight points of NOW's original 1967 "Bill of Rights for Women" dealt specifically with child care, maternity leave, and other benefits. In the following years, NOW and other women's groups repeatedly lobbied Congress, staged national protests, and filed class-action suits to combat discrimination against pregnant women and mothers. . . . [W]hen feminists pushed for women's rights in other areas — employment opportunities, pay equity, credit rights, women's health — mothers and their children benefitted, too.[8]

Next, Faludi would provide support for the antithesis—that it is the new right and conservatives who are really anti-family:

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5. Sally Quinn, *Who Killed Feminism? Hypocritical Movement Leaders Betrayed Their Own Cause*, WASH. POST, Jan. 19, 1992, at C1.

6. SYLVIA ANN HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA (1986).

7. FALUDI, *supra* note 1, at 316-17 (citing *Yankelovich Clancy Shulman poll* (Time/CNN television broadcast, Oct. 23-25, 1989)).

8. *Id.* at 316 (*emphasis in original*).

> [T]he real 'antimotherhood' crusaders weren't feminists, either; they were New Right leaders, conservative politicians, and corporate executives, who not only ignored mothers' rights but attacked them. It was, after all, Phyllis Schlafly, not Gloria Steinem, who led the opposition to congressional child care and maternity leave bills for two decades.[9]

Finally, she would use her justifiably irreverent style to show the hypocrisy in Quinn's argument, given Quinn's own personal life choices. Quinn's life does not reflect that home, family, or traditionally feminine ideals define women's "deepest, most fundamental needs." Nor does Quinn's privileged background permit her to speak about what is important for most women. For example, after her graduation from Smith College in 1963, Quinn embarked on a variety of professions: actress, public relations consultant, political campaigner, newscaster and journalist.[10] She became a reporter for the Washington Post in 1969[11] and published two books, *Regrets Only* and *Happy Endings*. One reviewer called this last book a reflection of Quinn's own "mired truths of marriage and motherhood: . . . Superwoman conflicts of career and home."[12] Quinn's home life, like her career path, has not been "traditional" either. Without benefit of marriage, Quinn lived with Benjamin Bradlee, then Executive Editor at the Washington Post, from 1973 until they eventually married in 1978.[13] Even after marrying Bradlee, Quinn kept her own name. As far as being pro-family and pro-child, Quinn admitted, "The idea of having a baby was just horrifying. . . . There were other things I wanted to do with my life."[14]

Quinn's emphasis on family has always been qualified. When she finally became pregnant at age forty, she confessed, "If there had been any problems [after amniocentesis], I would have had an abortion . . . . Absolutely. No question. It would have been a tough thing to go through, but I would have done it. I see no reason to bring a retarded child into the world when you don't have to."[15] When Quinn gave birth, she immediately hired a baby nurse and an Irish nanny.[16] So much for traditional mothering, at least for Quinn. Unfortunately, her young son suffered heart failure at three months, and now has a congenital heart defect.[17] Quinn admits, "I've hated every minute . . . ."[18]

But to a feminist lawyer, Faludi's book signals an area ripe for feminist legal scholarship; although Faludi does not develop her premise in

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9. *Id.* at 317.

10. Margie Bonnett Sellinger, *Sally Quinn, The Shark of Washington Society Reporters Makes a Splash with a First Novel*, PEOPLE MAG., Aug. 18, 1986, at 80.

11. ALMANAC OF FAMOUS PEOPLE (1989).

12. Patt Morrison, *Hanky Panky on the Potomac*, L.A. TIMES, Dec. 8, 1991, at 9 (book review).

13. Thomas B. Rosenstiel, *End of a Paper Trail*, L.A. TIMES, June 24, 1991, at E1.

14. Dolly Langdon, *Sally Quinn Misses A Deadline but Delivers her Best Story Yet: A Baby Boy*, PEOPLE MAG., May 17, 1982, at 57.

15. *Id.*

16. *Id.*

17. Sellinger, *supra* note 10.

18. Ralph Novak, *Starring Mothers*, PEOPLE MAG., May 25, 1987, at 16.

the legal arena. Another author should document the backlash's existence in this area and expose its impact on women's lives, focusing both on the setbacks encountered by female legal actors and the harm to women's equality generally. This sequel to *Backlash* should discuss harmful court opinions and reactionary new laws and detail the politics behind these restrictive measures. The sequel also should expose the clients, lawyers, judge and politicians contributing to the backlash. And, unlike Faludi's book, it should attempt to answer how to stop the backlash from continuing.

While indicating at the beginning of her book that she might be exploring the backlash in the world of law,[19] Faludi focuses primarily on popular culture. She asserts that the media and mass marketing, ushered in with the Victorian era, are "two institutions that have since proved more effective devices for constraining women's aspirations than coercive laws and punishments."[20]

Faludi does acknowledge the law's historical importance in reflecting the backlash.[21] Moreover, she claims that the present backlash affects women's current legal status:

> [O]nce again, as the backlash crests and breaks, it crashes hardest on these two shores [employment and fertility] — dismantling the federal apparatus for enforcing equal opportunity, gutting crucial legal rulings for working women, undermining abortion rights, halting birth control research, and promulgating 'fetal protection' and 'fetal rights' policies that have shut women out of lucrative jobs, caused them to undergo invasive obstetric surgeries against their will, and thrown 'bad' mothers in jail.[22]

Yet, Faludi merely dabbles in the law, leaving the legal reader wanting more detail. The legal reader wants Faludi to invoke her distinctive style and discuss fully decisions like *Wards Cove Packing Co., Inc. v. Atonio*,[23] *Grove City College v. Bell*,[24] *Rust v. Sullivan*,[25] *Webster v. Reproduc-*

19. For example, in her introduction, Faludi tempts the reader with facts about legal scholarship ("[l]egal scholars have railed against 'the equality trap' ") as well as lawyers ("less than 8 percent of all federal and state judges, less than 6 percent of all law partners" are women). FALUDI, *supra* note 1, at xii-xiii. She also teases the reader with statements about women's legal status. She states (1) opponents of women's rights claim women are so equal an Equal Rights Amendment is unnecessary, *id.* at ix, and (2) the current equality laws are inadequate or ineffective. *Id.* at xiv-xvii.

20. *Id.* at 48.

21. Faludi cites, for instance, "the rise of restrictive property laws and penalties for unwed and childless women of ancient Rome, the heresy judgments against female disciples of the early Christian Church, or the mass witch burnings of medieval Europe." *Id.* at 47. She also discusses the reaction to the 1848 Seneca Falls women's rights convention, which triggered the passage of restrictive divorce laws, the prohibition by Congress of the distribution of contraceptives and the criminalization of abortion in many states. *Id.* at 48-49.

22. *Id.* at 55. Among other things, she contends (1) our reproductive freedom is in greater jeopardy today than a decade earlier, *id.* at xiv; (2) Title IX is not being implemented, *id.* at xiv; (3) marital rape and domestic violence laws are inadequate, *id.* at xiv; (4) sexual discrimination in the work force is rampant, *id.* at xvi; and (5) average child support payments have fallen. *Id.* at xvii.

23. 490 U.S. 642 (1989) (In Title VII actions, specific discriminatory employment

tive Health Services,[26] just as she discusses *EEOC v. Sears*,[27] *Johnson v. Transportation Agency, Santa Clara County*,[28] *Lorance v. AT&T Technologies*[29] and *Christman v. American Cyanamid Co.*[30]

For example, Faludi's discussion of *EEOC v. Sears* reveals the type of marvelous information she can employ to make a case come alive.[31] In *Sears*, the EEOC claimed that Sears discriminated against women because men held over 90% of commission sales jobs, although at least 40% of the qualified job applicants were women. The average commissioned salesman made twice as much during his first year on the job as the average non-commissioned female salesclerk, regardless of seniority. Sears defended itself by claiming that women's interests differed from men's and that women did not want such "demanding" jobs.

Faludi discredits Sears's defense. She discloses, for example, that once the EEOC started investigating Sears, Sears's management doubled the proportion of women working in commission sales in one year. She also quotes several former female Sears employees who wanted commission work. One woman, Alice Howland, wanted to sell appliances because it paid more and she was bored in women's clothing sales, but Sears never allowed her the opportunity. Faludi even conducted her own experiment at a Sears store, interviewing women that desired, but were refused, commission sales positions.

Faludi provides illuminating information about some of the players involved in the *Sears* case. For example, Faludi focuses on Sears's witness Rosalind Rosenberg, a women's history professor at Barnard College, and a friend of Sears's chief defense lawyer. Faludi discusses Rosenberg's research errors, including her unsupported assumption that most saleswomen did not contribute significantly to their household's income. She reveals that Alice Kessler-Harris, a feminist labor historian at Hofstra University, accused Rosenberg of twisting the meaning of Kessler-Harris' work through the creative use of ellipses. Faludi undermines Rosenberg further by rhetorically asking the reader how

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practices must be shown to have a significantly disparate impact on employment opportunities and once a prima facie disparate impact case is established, employers have only the burden of production to establish a legitimate business justification for the practice.).

24. 465 U.S. 555 (1984) (federal funds only trigger coverage under Title IX for the specific program or activity receiving federal money, not the entire institution).

25. 111 S. Ct. 1759 (1991) (Under Title X of the Public Health Service Act, regulations prohibiting recipients from engaging in abortion counseling, referral, or mentioning abortion as a birth control option do not violate the First Amendment free speech clause or a woman's due process right to choose whether to terminate her pregnancy). *See* FALUDI, *supra* note 1, at 412 (brief mention of this case).

26. 492 U.S. 490 (1989)(state, inter alia, can prohibit governmental aid for abortion related purposes). This "famous" decision is mentioned by Faludi only in passing. *See* FALUDI, *supra* note 1 at 277, 412.

27. 628 F. Supp. 1264 (N.D. Ill. 1986). *See* FALUDI, *supra* note 1, at 378-87.

28. 480 U.S. 616 (1987). *See* FALUDI, *supra* note 1, at 388-92.

29. 409 U.S. 900 (1989). *See* FALUDI, *supra* note 1, at 394.

30. 578 F. Supp. 63 (N.D. W. Va. 1983). *See* FALUDI, *supra* note 1, at 440-53.

31. *See* FALUDI, *supra* note 1, at 378-88 (discussing EEOC v. Sears, 628 F. Supp. 1264 (N.D. Ill. 1986)).

Rosenberg's claim that women "are less likely to make the same educational investments as men" relates to selling sofas.

Faludi reveals that the government shifted its position in the case once Reagan became President. Clarence Thomas, then chair of the EEOC, publicly enunciated such an anti-prosecution stance that Sears's lawyers considered calling him as a witness. She makes Judge John Nordberg look ridiculous by explaining how Nordberg demanded that EEOC attorneys demonstrate that American women ever faced any employment discrimination. Nordberg, ultimately ruling for Sears, found that the women at Sears preferred lower-paying jobs.

Contrast this in-depth discussion of *EEOC v. Sears* with her discussion of *Webster v. Reproductive Health Services*. Faludi explains, and this is it, that *Webster* is a "famous. . . decision restricting women's right to an abortion. . . ."[32] which "ironically, [was handed down] on the eve of Independence Day."[33] The statement's brevity masks *Webster*'s significance to the backlash analysis.

Webster is not important or "famous" for its substantive outcome. The plurality opinion, as even Justice Blackmun admits, did little that was new: "For today, at least, the law of abortion stands undisturbed."[34] Rather, it is the surrounding politics that provides insight into the backlash. First, most women did not support the restrictions Missouri imposed on abortion availability. Even Justice Scalia acknowledged the "carts full of mail from the public, and streets full of demonstrators, urging us . . . to follow the popular will."[35] Over twenty million women exercised their abortion right since 1973 and millions of women spent their entire childbearing years under the umbrella of *Roe v. Wade*.[36] *Backlash*'s sequel should contrast this popular sentiment with the interests comprising the amicus curiae filed on behalf of the State of Missouri. Such an exercise would provide excellent ammunition for a Faludi-style attack on the Court's decision.[37]

Also, backlash analysts want the media's role in the *Webster* decision explored. The popular media often criticized the *Roe*[38] framework as being "unsound in principle" or "unworkable in practice," although some scholars claim that these criticisms do not withstand serious scrutiny.[39] Certainly, Justice O'Connor's role in *Webster* needs explaining. While upholding Missouri's abortion restrictions, Justice O'Connor re-

32. FALUDI, *supra* note 1, at 277.

33. *Id.* at 412.

34. *Webster*, 492 U.S. at 560 (1989) (Blackmun, J., concurring in part and dissenting in part).

35. *Id.* at 3065-66 (1989) (Scalia, J., concurring in part and concurring in judgment).

36. Brief for Appellees at n.18, Webster v. Reproductive Health Serv., 492 U.S. 490 (1989) (No. 88-605).

37. *See* Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685 (1990) (arguing that judges should be influenced by political pressures).

38. 410 U.S. 113 (1973).

39. Walter Dellinger and Gene B. Sperling, *Abortion and The Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83 (1989).

fused to look beyond the statute before her.[40] For this, Justice Scalia chastised her,[41] scholars called her the "lowest common denominator of the majority"[42] and others felt she was critical to influence in the future.[43] The addition of Justices Souter and Thomas to the Court may render her position, as well as most women's opinions on abortion, irrelevant. The irony is there to expose.

The lawyer craves a chapter analyzing the credibility that men like Clarence Thomas and Charles Stewart[44] have in the legal system, in comparison to women like Elizabeth Morgan[45] or Nancy Cruzan.[46] Additionally, who are the players in the legal arena contributing to the backlash? The legal reader desires a chapter exploring institutional legal opponents to women's equality that emerged in the 1980s,[47] e.g., the Solicitor General's office,[48] business interests[49] and conservative legal foundations.[50]

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40. *Webster*, 492 U.S. at 526 (O'Connor., J., concurring in part and concurring in judgment).

41. *Id.* at 532-33 (Scalia., J., concurring in part and concurring in judgment).

42. James Bopp, Jr. & Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 159-60 (1989).

43. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989).

44. After Charles Stewart's pregnant wife was murdered in Boston as they left a childbirth class, Stewart called police from his car phone and said he and his wife had been robbery victims. Stewart was not a suspect in the death until two and one-half months after the incident. When he learned of the investigation, he committed suicide by jumping off a bridge. *The MacNeil/Lehrer New Hour*, (broadcast, Jan. 4, 1990) (transcript #3639 on file).

45. Dr. Jean Elizabeth Morgan was incarcerated over 23 months for civil contempt when she refused to follow a court order that directed her to return her daughter to either her former husband (Dr. Eric Foretich) or the court's social service agency. Dr. Morgan alleged Dr. Foretich had sexually abused the child. Although the court heard twice (16 months and 22 months after Morgan's incarceration) that Morgan would never turn over her daughter and that she felt jail was the only route to protect her daughter, the court refused to find its contempt power no longer useful. Finally, the appellate court found "unsupported by the record most of the reasons the trial court gave . . . for disbelieving Morgan's testimony that she would not comply with the court's August 1987 order." Morgan v. Foretich, 564 A.2d 1, 9 (D.C. App. 1989).

46. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) (adult woman's wish that she forego continued medical care if she were ever to become a "vegetable" not honored by Supreme Court for lack of "clear and convincing proof" of the patient's desire once she entered persistent vegetative state).

47. *See* Tracey E. George & Lee Epstein, *Women's Rights Litigation in the 1980s: More of the Same?* 74 JUDICATURE 314, 321 (1991) (a wide range of groups opposed women's rights groups in the 1980s, unlike in the 1970s).

48. The Solicitor General took an active role in the attempt to limit women's rights during the 1980s. *See id.* at 320 (the Solicitor General filed *against* women's rights in 82% of the cases as amicus curiae under the Reagan and Bush adminstrations). *See also* Segal, *Courts, Executives and Legislatures*, THE AMERICAN COURTS: A CRITICAL ASSESSMENT (Charles Johnson and John Gates eds. 1990); LINCOLN CAPLAN, THE TENTH JUSTICE (1987).

49. Faludi mentions one such interest:

> It was the Chamber of Commerce, not the National Organization for Women, that was the single most effective force behind the defeat of the 1988 Family and Medical Leave Act. (The Chamber triumphed largely by claiming that the legislation would cost businesses at least $24 billion a year; the General Accounting Office later put the cost at about $500 million.)

FALUDI, *supra* note 1, at 317.

50. These would include, inter alia, the Pacific Legal Foundation, the Landmark Legal Foundation and the Northeast Legal Foundation.

The lawyer also desires an exploration of the judiciary's role in the backlash, a topic that could fill a book on its own. Faludi does mention how some judges try to dissuade young women, who must use state judicial "bypass" procedures with parental notification requirements for minors, from having abortions.[51] Yet this only leaves the legal reader wanting more. Perhaps she should probe into the personal life of Chief Justice Rehnquist, who between 1969 and 1981 opposed gender claims 84% of the time for cases in which he participated.[52] What personal background prompts this animus toward women? The legal reader wants Faludi to expose Massachusetts's Somerville District Court Judge Paul Heffernan, who mishandled battered-woman Pamela Nigro Dunn's case. Speaking to Ms. Dunn's batterer regarding the court's denial of police protection for Ms. Dunn, the judge declared: "You want to gnaw on her and she on you, fine, but let's not do it at the taxpayers' expense."[53] Pamela Nigro Dunn ended up dead in the town dump.[54]

While the above examples could be used to support Faludi's thesis, it would be more challenging for her to explain a number of judicial inconsistencies. During the backlash period, the Supreme Court decided many cases that advanced women's equality. For example, in discussing fetal-protection policies, Faludi mentions *United Automobile Workers v. Johnson Controls*.[55] In *Johnson Controls*, the Supreme Court found that the company's fetal-protection plan did violate the 1978 Pregnancy Discrimination Act. How does this decision, as well as the decisions in *Johnson v. Transportation Agency, Santa Clara County*,[56] *California Federal Savings & Loan Ass'n v. Guerra*,[57] *Meritor Savings Bank v. Vinson*,[58] *Price Waterhouse v. Hopkins*,[59] *United States Jaycees v. Roberts*,[60] or

51. FALUDI, *supra* note 1, at 420.

52. Karen O'Connor & Lee Epstein, *Sex and the Supreme Court: An Analysis of Judicial Support for Gender Based Claims*, 64 SOC. SCI. Q. 327, 328 (1983). After his ascendancy to Chief Justice, the Court adopted the women's rights position in 69% of the cases, whereas before 1986, it had adopted the women's rights position in 77% of the cases. *See* George & Epstein, *supra* note 47, at 321.

53. Eileen McNamara, *'No Quick Fix' in Abuse Case, Judge Rules*, BOSTON GLOBE, Nov. 13, 1986, at 1.

54. Eileen McNamara, *Judge Criticized After Woman's Death*, BOSTON GLOBE, Sept. 21, 1986, at 1.

55. 111 S. Ct. 1196 (1991).

56. 480 U.S. 616 (1987) (affirmative action plan upheld under Title VII where employer looked to a conspicuous imbalance in traditionally segregated job categories, and not to its own prior discriminatory practices, to justify its affirmative action plan and consideration of female employee's gender in its decision to promote her to road dispatcher). *See* FALUDI, *supra* note 1 at 388-93.

57. 479 U.S. 272 (1987) (California law requiring employers to provide leave and reinstatement to employees disabled by pregnancy was not pre-empted by or inconsistent with Title VII, as amended by the Pregnancy Disability Act, in that it met Title VII's purpose of removing barriers, which favored an identifiable group of employees over other employees and helped achieve equal employment opportunity). Not all feminists see this as a pro-women's rights position. *See, e.g.*, Wendy Williams, *Equality's Riddle: Pregnancy & the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L & SOC. CHANGE 325, 351-70 (1984-85).

58. 477 U.S. 57 (1986) ("hostile environment" sexual harassment is a form of sex discrimination actionable under Title VII.).

59. 490 U.S. 228 (1989) (Title VII covers employment decisions about partnership; employer may escape liability under Title VII for sex stereotyping only by establishing that

Northeast Women's Center, Inc. v. McMonagle[61] fit into Faludi's statement that "the courts may have undermined twenty-five years of antidiscrimination law"?[62] In fact, one study found that the Supreme Court in the 1980s proved more hospitable to women's rights claims than during the 1970s.[63] Faludi does not address these inconsistencies.

Faludi needs to account for other contrary evidence as well. The Reagan Administration undeniably disengaged from many programs that helped women and it did so "on the sly."[64] Simultaneously, an explosion of government funding for battered women's shelters occurred,[65] and a proliferation of state laws were enacted to combat domestic violence.[66] Moreover, how does one reconcile the result in the William Kennedy Smith trial with that in the Mike Tyson trial, or the positions of feminists arguing for and against pornography?[67] How can one square the increase in the "fathers' rights" lawsuits brought to stop abortions,[68] and the Supreme Court's rejection of such a veto power?[69] Another book is needed, focusing on the legal arena, to add depth and texture to Faludi's thesis that "a powerful counter-assault on women's rights exists, a backlash, an attempt to retract the handful of small and hard-won victories that the feminist movement did manage to win for women."[70]

The question remains—who should write the legal sequel? Preferably, the next book should be written by a feminist legal scholar, one who can evaluate the state of the law and its impact on women's equality from an informed perspective. Faludi does not appear up to the task because she sometimes states facts erroneously or in a misleading way.

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legitimate factors alone would have motivated it to make the same decision at the time the employment decision was made).

60. 468 U.S. 609 (1984) (Minnesota Human Rights Act prohibiting sex discrimination did not abridge Jaycee members' freedom of speech or expression, nor was it unconstitutionally vague or overbroad).

61. 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989) (RICO action permitted against persons who trespassed on abortion clinic property, destroyed property and threatened employees and patients).

62. FALUDI, *supra* note 1, at 454.

63. George & Epstein, *supra* note 47, at 314-15 (Supreme Court adopted the pro-rights position in 72% of the 42 cases it decided with full opinion between 1981 and 1990; whereas between 1969 and 1980, the Supreme Court supported the women's rights position in 58% of the 63 disputes resolved).

64. FALUDI, *supra* note 1, at 363, 369. *See also* Merle H. Weiner, *Disengagement as a Political Behavior: President Reagan and Title IX* (1985) (unpublished Senior Honors' Thesis, Dartmouth College) (on file with author).

65. Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 LAW & INEQ. J. 185 (1991).

66. Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61 (1984).

67. For feminists who take a pro-pornography stand, *see e.g.*, Brief for Amici Curiae, Feminist Anti-Censorship Taskforce, American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); Book Note, 9 HARV. WOMEN'S L. J. 215 (1986)(reviewing WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985)).

68. FALUDI, *supra* note 1, at 403.

69. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 70 (1976).

70. FALUDI, *supra* note 1, at xviii.

For example, when she discusses in passing *Stallman v. Youngquist*,[71] Faludi states, "In Illinois, a woman was summoned to court after her husband accused her of damaging their daughter's intestine in an auto accident during her pregnancy. She wasn't even the driver."[72] In fact, the mother was driving.[73] More importantly, Faludi omits telling the reader that the Illinois Supreme Court, in a very strong opinion, supported the women's rights position. Affirming summary judgment in the mother's favor on her child's claim, the court held a woman could not be liable for unintentionally injuring her fetus. The Court would not subordinate a woman's right to control her life to that of the fetus.[74] In fact, it recognized the impossibility of developing a judicial standard to adjudicate acts and omissions by the mother. It also recognized the existing prejudicial and stereotypical beliefs about women's reproductive abilities that might improperly influence a jury.[75] Faludi's style makes her a persuasive polemicist, but it is too imprecise for legal analysis.

Finally, this criticism indicates Faludi's method of documenting her research, like her selective use of facts, makes the reader doubt her intellectual honesty. Part of the problem is that Faludi does not use footnotes in the classic sense. Rather, a reader is confronted with the arduous chore of flipping to the back of the book any time he or she wants to see Faludi's source for a statement. As Faludi employs a system of notes that relies on the page number and the first few words of a sentence for identification, she can interweave documented statements with undocumented statements and no one, other than a diligent editor, ever knows what is "fact" and what is "fiction." This technique undercuts her credibility somewhat, especially when one recognizes some important statements are not documented[76] and that Faludi's criticism of others often relies on their faulty methodology.[77]

Nonetheless, the shortcomings of *Backlash* should not detract from its value as a book that synthesizes and describes the current reactions against women's attempts to achieve equality. Moreover, Faludi estab-

71. Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988).

72. FALUDI, *supra* note 1, at 425.

73. *See* Stallman v. Youngquist, 504 N.E.2d 920 (Ill. App. Ct. 1987).

74. *Stallman*, 531 N.E.2d at 359.

75. *Id.* at 360.

76. For example, Faludi claims that "in the popular imagination, the history of women's rights is more commonly charted as a flat dead line that, only twenty years ago, began a sharp and unprecedented incline." FALUDI, *supra* note 1, at 46. No citation is given for her characterization of popular belief. As she often criticizes others for undocumented representations of popular belief, her failure to offer some support for the statement appears hypocritical. Faludi also makes some references to legal reform efforts, which are undocumented. *See, e.g.*, FALUDI, *supra* note 1, at 236.

77. *See, e.g.*, FALUDI, *supra* note 1, at 9-18 (discussing the Yale/Harvard Study, which asserts that a marriage crunch for baby-boom college-educated women exists because of a man shortage); *see also* LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (author's undocumented conclusions regarding women and divorce). Faludi often accepts certain studies' conclusions without exploring, or at least sharing with the reader, the study's methodology. *See, e.g.*, FALUDI, *supra* note 1, at 16.

lishes, albeit indirectly, the need for a feminist legal scholar to document the backlash thesis in the legal arena, research that could help women move forward in the 1990s.

DUMPING IN THE MOUNTAINS: INSURERS PAY DEFENSE, NOT CLEANUP, COSTS IN *HECLA MINING CO. V. NEW HAMPSHIRE INSURANCE CO.*

I. INTRODUCTION

Since the early 1800s, Colorado's vast natural resources have lured prospectors and mining companies[1] to the area's mountainous regions. Mining activity increased as state and federal legislatures enacted laws to promote exploitation of minerals.[2] In return, the mining industry produced billions of dollars in revenue for the state's coffers. Policies that promote industry, however, have traditionally conflicted with a growing public policy concern—the need to protect the environment. Thus, legislative support of the mining industry often clashes with the public desire to safeguard the environment, particularly in Colorado's wilderness areas. To balance these conflicting interests, the Colorado legislature enacted laws that both encouraged and restricted mining activities.[3]

In *Hecla Mining Co. v. New Hampshire Insurance Co.*,[4] the Colorado Supreme Court favored the mining company's interests in a declaratory judgment action. The court held the insurance company had a duty to defend Hecla Mining Co. in a lawsuit filed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), to which the original named defendants joined Hecla.[5] The CERCLA pollution damages resulted in part from Hecla's continuous discharges into an improperly maintained mining tunnel. Hecla's insurance policies attempted to exclude coverage for pollution that was not "sudden and accidental."

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1. The focus of this Comment is the mining industry. Although the mining industry is not the only industry producing hazardous wastes from its business activities, nor necessarily is it the primary offender, a detailed analysis of other industries is beyond the scope of this Comment.

2. The most recent example of Colorado legislative promotion of mineral exploitation is found in the Colorado Mined Land Reclamation Act, COLO. REV. STAT. §§ 34-32-101 to 125 (1984 & Supp. 1991). *See also* Colorado Surface Coal Mining Reclamation Act, COLO. REV. STAT. §§ 34-33-101 to 137 (1984 & Supp. 1991). Similar federal legislation includes the Mining Law of 1872, 30 U.S.C. §§ 22-54 (1988) and the Mining Law of 1920, 30 U.S.C. §§ 181-187 (1988).

3. The Colorado Court of Appeals ruled against Hecla by interpreting the Colorado Mined Land Reclamation Act (Act) to express an intent to "aid in the protection of wildlife and aquatic resources . . . and promote the health, safety, and general welfare of the people of this state." New Hampshire Ins. Co. v. Hecla Mining Co., 791 P.2d 1154, 1157 (Colo. Ct. App. 1989) (citing COLO. REV. STAT. § 34-32-102 (1984)). The Court of Appeals reasoned that the Act provided constructive notice to mine operators that mining could cause environmental damage. *Id.*

The Colorado Supreme Court rejected this argument: "The court of appeals reasoning is in error. . . . Contrary to the court of appeals analysis, the Mined Land Act proclaims that mining is a necessary and proper activity and should be promoted by the state of Colorado." Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991).

4. 811 P.2d at 1083.

5. 42 U.S.C. §§ 9601-9607 (1983 & Supp. 1990).

The *Hecla* dispute began in 1983, when the State of Colorado filed suit against Asarco Resurrection Mining Co. and Res-Asarco Joint Venture in federal district court under CERCLA.[6] In January 1985, Asarco joined Hecla and over 200 individuals and companies[7] seeking contribution for the cleanup costs. The third-party complaint against Hecla led to the present controversy regarding whether New Hampshire Insurance (NH) and Industrial Indemnity (Industrial) had a duty to defend Hecla in Colorado's CERCLA lawsuit[8] under a series of comprehensive general liability (CGL) insurance policies, which contained clauses excluding pollution damages.

The Colorado Supreme Court held the allegations in the CERCLA complaint did not fall within the pollution exclusion clause[9] and, therefore, the insurers had a duty to defend.[10] The Hecla decision: (1) broadly construed standard language in the CGL,[11] (2) held the policy exclusion clauses were inapplicable to the insurers' duty to defend a CERCLA lawsuit,[12] and (3) changed established procedure in Colorado insurance law. The court also stated insurers should litigate declaratory judgment actions *after* defending insureds in underlying CERCLA actions. The court cited case law and rules of contract interpretation to support its policy-based decision that the Colorado Mined Land Reclamation Act[13] proclaimed mining "a necessary and proper activity (that) should be promoted by the state of Colorado."[14] This Comment focuses on whether the *Hecla* decision properly resolved either the insurance contract dispute or the conflict between mining and environmental protection and cleanup.

This Comment briefly summarizes the evolution of the standard CGL insurance policies in environmental litigation. It then reviews the drafting history of the pollution exclusion clause and summarizes case law construing policy language. Finally, this Comment criticizes the *Hecla* holding because the precedent may potentially increase litigation and create incentives to pollute. This Comment also argues that by finding a broad duty to defend against a CERCLA complaint,[15] the *Hecla* court may have fallen short of the goal to promote mining for two reasons: environmental insurance costs may now escalate and mining companies may still be denied coverage in subsequent declaratory judgment actions.

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6. *See* Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985)

7. *Hecla*, 811 P.2d at 1085.

8. The federal government has also filed suit against Hecla and other mining companies. United States v. Apache Energy & Minerals Co., No. 86-C-1675 (D. Colo. 1986). The duty to defend the federal lawsuit is not at issue in this declaratory judgment action.

9. *Hecla*, 811 P.2d 1088.

10. *Id.* at 1092.

11. *Id.* at 1088, 1092.

12. *Id.* at 1092.

13. *See supra* note 3.

14. *Hecla*, 811 P.2d at 1088.

15. *See id.* at 1088-89.

II. CERCLA: THE GOVERNMENT'S CLAIM AGAINST POLLUTERS

Congress tried to ameliorate years of contaminating industrial releases into the environment by passing CERCLA in 1980.[16] The basic principle behind CERCLA is to place responsibility for cleanup on the polluters while furnishing money for cleanup[17] and study of contaminated federal sites.[18] CERCLA identifies several broad categories of potentially responsible parties (PRPs) who may be liable for cleanup of hazardous chemical contamination. PRPs are any past and present owners of contaminated property, operators of contaminated facilities, persons transporting hazardous materials to the property or arranging for treatment and disposal, or others accepting the substances for transport to a contaminated site.[19] The Environmental Protection Agency or any person, including a state's attorney general, may request an injunction against PRPs,[20] who may be strictly liable for cleanup costs of the contaminated site.[21]

Broadly construing CERCLA liability, courts apply retroactive liability for "contamination caused before the effective date"[22] of CERCLA and permit joint and several liability to apply to "one or a few PRPs to recover all of the cleanup costs."[23] As another means of extending

16. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1989)). Six years after its enactment CERCLA was significantly revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA). *See* Pub. L. No. 99-499, 100 Stat. 1613.

The focus of this Comment is CERCLA. Congress has enacted many other laws to protect the environment by imposing financial liability on polluters. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); Clean Water Act, 33 U.S.C. 1251-1376 (1988 & Supp. I 1989); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92 (1988). A discussion of the use of the *Hecla* holding as precedent for future insurance litigation under these other statutes is beyond the scope of this Note, but case law can be read to support an argument analogizing the statutes. *See, e.g.*, Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360 (Ohio Ct. App. 1972) (pollution exclusion clause in RCRA based suit did not exclude coverage when insured intended the release of pollutants but not the resulting damage).

17. Superfund, a federal trust fund created by CERCLA, pays for government lawsuits against responsible parties in order to recover cleanup costs which are then deposited back into the fund. FREDERICK R. ANDERSON et. al. ENVIRONMENTAL PROTECTION: LAW AND POLICY 614-15 (2d ed. 1990). Remedial costs for short-term emergency responses and removal costs for long-term cleanup are both recoverable by the EPA under CERCLA. *Id.* A state may take remedial action only by entering into a cooperative agreement with EPA to pay 10 percent of the cleanup cost. 42 U.S.C. § 9604(c)(3) (1988). The Department of Justice may bring suit whenever there is an "imminent and substantial endangerment to the public health or welfare or the environment." *Id.* § 9606(a) (1988).

18. *Id.* § 9604(b)(1) (1988).

19. *Id.* § 9607(a)(1)-(4).

20. *See id.* § 9606(a). *See also id.* § 9601(32).

21. *Id.* § 9607(a)(4)(a)-(d). Removal and remedial costs at a single hazardous waste site averages between 30 to 50 million dollars. EPA estimates the total liability for 19,000 sites nationwide could total over 100 billion dollars. Stephanie E. Pochop, *Jones Truck Lines v. Transport Insurance Co.: More Fuel for the Heated Debate Over insurance Coverage for CERCLA Clean Up Costs*, 35 S.D. L. REV. 298 (1990).

22. Richard L. Griffith, *The Impact of CERCLA Liability on Real Property Transactions*, 17 COLO. LAW. 471 (1988) (citing United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986)).

23. *Id.* at 471 (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983)).

liability for pollution damages, courts liberally interpret "owner" and "operator" in determining which parties are liable for contaminated property.[24] CERCLA provides only a few defenses, such as the "innocent purchaser" defense[25] and qualification for *de minimis* settlement.[26] The *Hecla* dispute provides a typical fact scenario for a CERCLA lawsuit because Congress intended to remedy situations such as the California Gulch contamination when it enacted CERCLA.

III. Historical Development of General Coverage Issues

Insurance transfers, spreads and allocates risks[27] from a single business to a group of businesses with premium costs directly reflecting a business operation's level of risk.[28] When the parties enter into an insurance contract, an insurance company assumes part of the business risk and the insurance proceeds become a resource that enables continued business operations "without the outlay of internal capital or assets to reach a level of self-insurability."[29] Insurance provides a method for businesses to survive financial losses from victim compensation or pollution cleanup, and is most efficient when the losses are statistically predictable within an industry, but are not pervasive.[30] Environmental protection statutes complicate this risk allocation and calculation because the liability, which may be ultimately imposed, is usually unforeseeable when most insurance policies are written.[31] For example, "[n]either insured nor insurer anticipated the impact of CERCLA, SARA or SUPERFUND" before the laws were passed.[32] Insurers reluctantly insured for environmental damage due to the uncertainties in calculating costs associated with cleanup.[33] Although insurers redrafted the policies several times to accommodate the new environmental risks, "[u]ncertainty has plagued the insurance industry at each stage because courts have interpreted policy language inconsistently and imprecisely.

24. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (liability found against present owners of site whose actions did not contribute to contamination); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (lenders holding title for four years who foreclosed on contaminated property were liable); United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1987) (corporate officers who were stockholders responsible for hazardous waste disposal at the property were liable under CERCLA); United States v. Argent Corp., 21 Env't. Rep. Cas. (BNA) 1353 (D.N.M. 1984) (where lessee caused contamination, owner and lessor of site held liable). Griffith, *supra* note 22, at 471-73 n.9-16.

25. This defense is available only when a third-party's act or omission caused the contamination and the PRP safeguarded against any such acts that were foreseeable. 42 U.S.C. § 9607(b) (1988).

26. *Id.* § 9622.

27. M. Jane Meridian, *Insurance Coverage for Environmental Damages*, *in* 3 The Law of Distressed Real Estate, 30A-1, 30A-6 (Baxter Dunaway ed., 1990).

28. *Id.* at 30A-6 (citing Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 Colum. L. Rev. 942, 946 (1988)).

29. *Id.*

30. *Id.*

31. *Id.* at 30A-7.

32. *Id.*

33. Fred Feinstein & Carolyn Hesse, C532 ALI-ABA 1403, 1417 (1990).

Consequently, insurers have been left to speculate as to their future liabilities."[34]

A. *The Evolution of the Pollution Exclusion Clause*

The drafting history of insurance policies for pollution-related damages reveals several attempts by insurers to clarify contract intent and establish certainty in risk calculations, after courts inconsistently construed contract language and expanded coverage liability. In early environmental litigation, courts held CGLs covered pollution "damages," which were not explicitly enumerated in the policies. When insurers revised policies to provide coverage only for pollution damages that were accidents and occurrences, courts again reinterpreted the contract language to expand coverage. Eventually, these largely unsuccessful attempts at clarifying coverage intent forced insurers to specifically exclude pollution damages from coverage.

1. Are Pollution Damages Covered?

Initially, courts shifted pollution clean-up costs from polluters to insurance companies by construing "damages" in general CGL policies to encompass all pollution-related damages.[35] Courts easily rationalized this cost-shifting because the word "comprehensive" in the title of CGLs implied that total coverage was provided.[36] Further, the purpose of the policies was to protect the insured against liability from third-party damages and to defend the insured against bodily injury and property damage claims.[37] It followed that insureds bought CGLs in order to gain broad protection against personal injury and property damage resulting from pollution caused by regular business activities.[38] CGL policies exclude first-party damages because other insurance policies cover these losses[39] (e.g., automobile no-fault insurance covers first-party damages).[40] Nonetheless, many commentators argue insurers never intended to cover pollution damages that resulted from risks the

34. E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L. J. 1237, 1241 (1986).

35. With heightened public awareness of environmental problems, pollution was attacked in the courthouse when "the public 'turned to the courts for the environmental protection that [it] did not always obtain through legislative bodies, administrative agencies, or political pressures.' " *Id.* at 1237 n.2 (quoting Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762 (1976)).

36. Marla Jo Aspinwall, Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984).

37. Robert D. Chesler et. al. *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 14 (1986).

38. *Id.*

39. *Id.* at 14-15.

40. *Id.* at 15. Some policy coverage for pollution damages is available under Environmental Impairment Liability policies, but these have yet to be judicially interpreted. *See* Jonathan C. Averback, Comment, *Comparing the Old and New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language Same Results?*, 14 B.C. ENVTL. AFF. L. REV. 601, 602 (1987) (citing H.G. Sparrow, *Hazardous Waste Insurance Coverage: Unexpected Past, Uncertain Future*, 64 MICH. B.J. 169, 171-73 (1985)).

insured knew of or intentionally assumed.[41]

Additionally, public policy disfavored insuring intentional behavior.[42] When CERCLA was passed, making PRPs strictly liable, insurance liability quickly escalated despite drafting intent. The new policy to fund cleanups replaced the former public policy not to insure for intentional behavior. This judicial expansion of coverage to include pollution-related damages led insurance companies to revise the policies and provide coverage only for pollution damages resulting from "accidents" and then later, for strictly-defined "occurrences." Each change of policy language provoked a fierce round of litigation between contracting parties. Courts consistently held in favor of PRPs in order to help fund cleanups under both the accident-based and occurrence-based policies.

2. Accident-Based Pollution Insurance Policies

Before 1966, CGL policies covered only accidental pollution damages. Referred to as accident-based policies, the name originated from the operative clause: "To pay, on behalf of insured, all sums which the insured shall become legally obligated to pay as damages because of . . . destruction of property . . . caused by accident."[43] What "accident" meant to insurers was clear,[44] but the companies did not define the term in the policies so courts interpreted the seeming ambiguity.[45] Courts held "accident" meant a variety of things, from unforeseeable[46] to un-

41. *See, e.g.*, Chesler, *supra* note 37, at 15-16; *see also* Soderstrom, *supra* note 35, at 767; Sheldon Hurwitz & Dan D. Kohane, *The Love Canal — Insurance Coverage for Environmental Accidents*, 50 INS. COUNS. J. 378 (1983).

42. It would be ludicrous to expect an insurance company to pay for damages that an insured intentionally inflicted upon an innocent victim. For example, few would contend that a grocery store owner who intentionally shoots a customer should collect from his store insurance policy for the damages.

43. Chesler, *supra* note 35, at 15.

44. Rosenkranz, *supra* note 34, at 1241 n.24 (citing Leslie, *Automobile and General Liability Insurance*, 70 A.B.A. SEC. INS. NEGL. & COMPENS'N L. 84-85 (1962) (insurers made public their intent)).

45. *See* Sam P. Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 FORUM 513, 515-24 (1984).

46. *E.g.*, American Casualty Co. v. Minnesota Farm Bureau Serv. Co., 270 F.2d 686, 691-92 (8th Cir. 1959) (damages occurring over more than six years from fertilizer manufacturing not covered because they were not unforeseeable or unexpected); Thomason v. United States Fidelity & Guar. Co., 248 F.2d 417, 419 (5th Cir. 1957) (damages caused by mistake or error excluded from coverage); Hutchinson Water Co. v. United States Fidelity & Guar. Co., 250 F.2d 892, 893-94 (10th Cir. 1957) (insured's failure to maintain sufficient pressure in system excluded coverage for damages because they were the natural and probable consequence of the acts); Kuckenberg v. Hartford Accident Indem. Co., 226 F.2d 225, 226 (9th Cir. 1955) (damages were not accidental because they were the normal and probable consequence of building the road); Farmers Elevator Mut. Ins. Co. v. Burch, 187 N.E.2d 12, 14 (Ill. App. Ct. 1962) (foreseeable and natural and ordinary consequences of an act are excluded from coverage); Harleysville Mut. Casualty Co. v. Harris & Brooks, Inc., 235 A.2d 556, 559 (Md. Ct. Spec. App. 1967) (where it is foreseeable damage would occur from smoke and soot, actor's conduct in burning trees was not an accident); Foxley & Co. v. United States Fidelity & Guar. Co., 277 N.W.2d 686, 688 (Neb. 1979) (damages that were the natural result of the policyholder's deliberate acts were not covered under accident-based policy); United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754, 758 (Okla. 1951) (damage from cement dust caused by policyholder's voluntary acts and negli-

expected and unintended.[47] A negligent act could also be considered an accident[48] and still be covered[49] because the courts adopted a loss/act distinction. As long as the insured did not expect or intend the ultimate loss,[50] pollution resulting from negligent acts were covered in some jurisdictions.[51] Courts "may have taken the distinction too far"[52] by holding accidental pollution could flow from an intentional act.

> In short, the fragmented judicial treatment of environmentally related damage under accident-based policies left the insurer unable to predict its potential liability. While the insurers have

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gence were not accidental); Town of Tieton v. General Ins. Co. of Am., 380 P.2d 127, 130-31 (Wash. 1963) (sewage pollution of well is expected and foreseeable).

47. Courts that held damages were included in coverage generally held that the loss, not the act, was unexpected. *See, e.g.*, Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145, 149-50 (D. Or. 1966) (unanticipated result of expected act was "unexpected" and thus covered); Moffat v. Metropolitan Casualty Ins. Co., 238 F. Supp. 165, 172 (M.D. Pa. 1964) (foreseeability of damage does not exclude coverage); City of Myrtle Point v. Pacific Indem. Co., 233 F. Supp. 193, 197-98 (D. Or. 1963) (expected malfunction of sewage plant not excluded from coverage); Employers Ins. Co. v. Rives, 87 So. 2d 653, 655-58 (Ala. 1955) (accident defined as chance happening is not mere negligence and is not excluded); Moore v. Fidelity & Casualty Co., 295 P.2d 154, 156-58 (Cal. Ct. App. 1956) (unexpected and unforeseen damage from laundromat was accidental); Travelers v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963) (unexpected slippage of earth at strip mine is accidental despite foreseeability); White v. Smith, 440 S.W.2d 497, 507-08 (Mo. Ct. App. 1969) (unintended resulting damage from intentional acts were covered); City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632, 634-37 (Neb. 1973) (damage caused by pollution of groundwater from insured city's lagoon was covered because it was unexpected); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 437 Pa. 493, 496, 263 A.2d 368, 369 (1970) (damages caused by negligence may still be accidental), *rev'g*, 251 A.2d 739 (Pa. Super. Ct. 1969); Taylor v. Imperial Casualty & Indem. Co., 144 N.W.2d 856, 859 (S.D. 1966) (damages from negligent acts were covered because "the unintended consequences were caused by accident").

48. *See, e.g.*, Employers Ins. Co. v. Rives, 87 So. 2d 653, 656 (Ala. 1955) (accident means happening by chance or unexpectedly and does not exclude negligence); Minkov v. Reliance Ins. Co., 149 A.2d 260, 263 (N.J. Super. Ct. App. Div. 1959) (mere fact that damage was caused by negligence in not a bar to coverage); Iowa Mut. Ins. Co. v. Fred M. Simmons Inc., 138 S.E.2d 512, 515 (N.C. 1964) (foreseeability of damage does not bar recovery for negligence when it would render policy worthless to insured). *But see* Gray v. State Dep't of Highways, 191 So. 2d 802, 815 (La. Ct. App. 1966) (to determine whether something was an accident requires a determination whether the person to whom the injury expected foresaw the damage), *modified*, 202 So. 2d 24 (La. 1969).

49. Courts wrestled with whether negligent conduct was included in coverage for accidental pollution since "accident" normally implies foreseeability is absent. Rynearson, *supra* note 45, at 515. The distinction between negligence and accident in tort law has been the lack of fault in accidents. *Id. Compare* Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368, 369 (Pa. 1970) (negligent harm may still be caused by accident) *and* Iowa Mut. v. Fred M. Simmons Inc., 138 S.E.2d 512, 515 (N.C. 1964) (to define "accident" as negligence makes the policy worthless to the insured) *with* City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1058 (8th Cir. 1979) (coverage for some negligent acts does not necessarily extend to all negligent acts).

50. White v. Smith, 440 S.W.2d 497, 507 (Mo. Ct. App. 1969) (intended acts and intended results are very different). *But see* Kuckenberg v. Hartford Accident & Indem. Co., 226 F.2d 225, 227 (9th Cir. 1955) (damages in excess of that forseen does not make an incident an "accident"); Hardware Mut. Casualty Co. v. Gerrits, 65 So. 2d 69, 70 (Fla. 1953) (where reliance on false information caused damages, they were not accidental because they were a natural and probable consequence).

51. Rynearson, *supra* note 45, at 517 (citing Messersmith v. American Fidelity Co., 133 N.E.2d 432, 433 (N.Y. 1921) (accidental injuries are determined for insurance purposes by the results rather than by the causes)).

52. Rosenkranz, *supra* note 34, at 1244-45.

> long since abandoned accident-based coverage, this spectre of the 'accident' has continued to haunt the insurance policy in each of its subsequent forms.[53]

3. The Occurrence Limitation

In 1966, insurance companies responded to inconsistent judicial construction, and the needs of industry to obtain more coverage,[54] by drafting new policies.[55] Referred to as occurrence-based, the new policies covered pollution damages caused by "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[56] Pollution damage from gradual loss might be covered,[57] but coverage was excluded for clients who flagrantly endangered public health,[58] knowingly polluted[59] or assumed the risks as costs of doing business.[60] Courts failed to recognize the insurers' intent to achieve clarity and instead focused on the "intent to expand coverage."[61] Consequently, more judicial inconsistency followed from these new occurrence-based policies. First, the foreseeability of damages clouded court decisions in many jurisdictions. Confusion resulted because some courts read "expected" to mean a "substantial probability"[62] damage would occur, while other courts precluded cover-

53. *Id.* at 1246.

54. In an effort to clarify and expand the scope of coverage under the CGL policy, the National Bureau of Casualty Underwriters (NBCU) and the Mutual Insurance Rating Bureau (MIRB) completely revised the standard-form policy in 1966 and dropped the phrase caused by accident from the coverage provisions of the policy.

Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia* (citing American Home Products, 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983)).

55. Rosenkranz, *supra* note 34, at 1246.

56. Rynearson, *supra* note 45, at 513 (citing ROWLAND H. LONG, 4 THE LAW OF LIABILITY INSURANCE 29 App. & 53 App. (1981)).

57. The NBCU explained its intent in drafting the occurrence-based policy: "[I]t is no longer necessary that the event causing the injury be sudden in character. In most cases the injury will be simultaneous with exposure. However, in some other cases, injuries will take place over a long period of time before they become manifest." Malcom B. Rosow & Arthur J. Liederman, *An Overview to the Interpretative Problems of "Occurrence" in Comprehensive General Liability Insurance*, 16 FORUM 1148, 1151 (1981) (quoting Nachman, *The New Policy Provisions for General Liability Insurance*, 18 THE ANNALS 3, 197 (1965)).

58. Soderstrom, *supra* note 35, at 764-65 (there should be no coverage for damages resulting from an insured's business operations which are knowingly in violation of environmental statutes and where the insured has failed to remedy such defects).

59. Robert M. Tyler & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 500 n.22 (1981) (insurers did not intend to cover clients who intentionally polluted, further, "occurrence" definition expressly excludes coverage for damages resulting from such behavior).

60. R. KEETON, INSURANCE LAW BASIC TEXT 297-98 (1971) (Regular expenses of doing business are excluded from insurance coverage because liability policies do not cover highly expectable losses. Pollution damages may be such regularly occurring expenses that they are costs of doing business, rather than risks to be insured.).

61. Rosenkranz, *supra* note 34, at 1248.

62. *Id.* at 1249 (citing City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1058-59 (8th Cir. 1979)).

age for any forseeable loss.[63] Second, the word "accident" in the definition of "occurrence" caused further confusion.[64] Courts followed the same loss/act distinction methodology used in interpreting accident-based policies to distinguish between "intentional *losses* caused by the insured's intentional acts and unexpected or unintended losses caused by the insured's intentional *acts*."[65] Pollution damages from willful discharges were once again covered if the loss was neither expected nor intended. Continued judicial expansion of coverage and the subsequent increased litigation led to the insurance industry's final drafting response—the pollution exclusion clause.[66]

B. *Judicial Construction of the Pollution Exclusion Clause*

In 1973, insurers again revised policies to add exclusionary clauses, which covered only pollution damages from occurrences that were "sudden and accidental."[67] Since occurrence-based policies could extend pollution coverage to most situations, insurers added a clause to exclude damages arising from regular, continuous business practices.[68] Even if a polluter claimed it did not expect a loss, the policies would not cover damage if it knowingly polluted or if discharges of pollutants continued over time.[69] Insurers felt public policy supported their decision because industry would have an incentive to become environmentally efficient if coverage was denied.[70] Unfortunately, the companies chose to draft the exclusion clauses with the same "accident" language that caused so much confusion in the earlier drafts.

> That unfortunate language, along with the incorrigible judicial will to compensate blameless victims, plunged the pollution exclusion further into ambiguity and uncertainty than either of its

63. Rosenkranz, *supra* note 34, at 1249 (citing City of Wilmington v. Pigott, 307 S.E.2d 857, 859 (N.C. Ct. App. 1983) (an "accident" is that which happens fortuitously and is unexpected, unusual and unforeseen)).

64. *See* James A. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 559 (1980) (courts have established five diverse tests to define "occurrence": effect, causation, time and space, operative hazard and popular meaning); Rynearson, *supra* note 45, at 518-21 (reviewing split among courts regarding interpretation of "accident" in the occurrence limitation).

65. Rosenkranz, *supra* note 34, at 1250 (citing Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360, 365 (Ohio Ct. App. 1972) (damages from manufacturing practices were unintentional even though caused by acts that were intentional)).

66. *See id.* at 1251.

67. *Id.*

68. *Id.* at 1252.

69. *Id.* at 1253.

70. *Id.* The president of the Insurance Company of North America (INA) stated that only accidental pollution was covered (e.g. equipment breakdown) and insurers

> [n]o longer [will] insure the company which knowingly dumps its wastes. In our opinion, such repeated actions—especially in violation of specific laws—are not insurable exposures . . . . We at INA hope that our anti-pollution exclusion may help encourage many companies to take the first, crucial steps toward improving their manufacturing process—the steps that will lead eventually to a cleaner, healthier, and we hope, happier life for all.

Id. at 1253 n.82 (quoting a speech by Charles Cox, *Liability Insurance in the Era of the Consumer*, Annual Conference of the American Society of Insurance Management (Apr. 9, 1970)).

predecessors . . . .[71]

When interpreting the pollution exclusion policies, courts were uncertain as to how the CGL occurrence limitation integrated with the new pollution exclusion and its exception. For example, the policy NH and Industrial issued to Hecla limited the scope of coverage by excluding pollution damages as follows:

> *This insurance does not apply* . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, pollutants into or upon land, the atmosphere or any water course or body of water . . . .[72]

The policy also contained an exception to the pollution exclusion, which allowed coverage for pollution in certain circumstances as follows: ". . . *but this exclusion does not apply if such discharge,* dispersal, release or escape *is sudden and accidental* . . . ."[73]

1. The Exclusion Excludes Nothing

Regarding this form of exclusionary clause, courts basically held the pollution exclusion clause to be coextensive with the occurrence limitation and interpreted "sudden and accidental" to mean unintended and unexpected. This made the exception redundant and the exclusion indistinguishable from the coverage. Courts also defined "sudden" in terms of the expectation element of accident, rather than focusing on its temporal significance. For example, in *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*,[74] the court held the seepage of pollutants into an aquifer was "sudden and accidental" no matter how many discharges occurred and even though they "may have been gradual rather than sudden."[75] Other courts held the exception applied if the pollution was either sudden *or* accidental, against the clear language of the clause. Thus, the accident language used in these clauses triggered coverage in almost any situation. By 1986, courts held pollution exclusion clauses were ambiguous[76] and did not exclude passive pollu-

71. Rosenkranz, *supra* note 34, at 1253.

72. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1086 (Colo. 1991)(emphasis in original).

73. *Id.* at 1086-87 (emphasis in original).

74. 451 A.2d 990 (N.J. Super. Ct. App. Div. 1982).

75. *Id.* at 994. *See also* Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603 (App. Div. 1980) (although not instantaneous, leak from negligently installed gas tank was "sudden").

76. Many courts that denied summary judgment left resolution of the ambiguity issue for juries to determine whether the pollution was excluded from coverage based on the facts (not pleadings). *See, e.g.*, Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985) (issue of fact whether insured had knowledge of toxics on his property); City of Northglenn v. Chevron, U.S.A., Inc., 634 F. Supp. 217 (D. Colo. 1986) (genuine issue of fact whether service station seepage was covered); State of Idaho v. Bunker Hill Co., 647 F. Supp. 1064 (D. Idaho 1986) (genuine issue whether pollution damage was an "occurrence"); CPS Chem. Co. v. Continental Ins. Co., 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) (genuine issue whether harm was intentional or inadvertent); A-1 Sandblasting & Steamcleaning

tion or gradual pollution occurring over twenty years or less.[77] With few exceptions,[78] courts ruled in favor of the insureds[79] and made the pollution exclusion clause "essentially superfluous by way of judicial merger into the occurrence clause."[80]

Co. v. Baiden, 632 P.2d 1377 (Or. Ct. App. 1981) (issue of fact whether oversprayed paint was a "liquid" within policy's pollution exclusion clause), *aff'd*, 643 P.2d 1260 (Or. 1982).

77. *See* R. Stephen Burke, *Pollution Exclusion Clauses: The Agony, the Ecstasy, and the Irony for Insurance Companies*, 17 N. KY. L. REV. 443, 455 (1990).

78. Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (pollution from regular business activity was excluded); Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 669 F. Supp. 798 (E.D. Mich. 1986) (continuous plant emissions were excluded), *rev'd*, 905 F.2d 554 (6th Cir. 1990); Fischer & Porter Co. v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986) (pollution from chemicals drained during regular business operations excluded); American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984) (continuous toxic waste dumping excluded); Healy Tibbitts Constr. Co. v. Foremost Ins. Co., 482 F. Supp. 830 (N.D. Cal. 1979) (pollution from sinking oil barge excluded from coverage); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981) (damages from discharges which decreased visibility causing car accident excluded); Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Or. Ct. App. 1985) (acid discharges which were part of business practice excluded).

79. FEDERAL COURTS:
Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1985) (insurance policy covers fire damages and contamination claims); National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986) (inspections did not detect pollution problem, therefore, damages were not "sudden and accidental"); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985) (lack of control over release of PCBs and denying EPA access to company property was not enough to find intentional harm); Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978) (pulp mill pollution included in coverage).
STATE COURTS:
United States Fidelity & Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985) (sewage overflows from construction were not excluded); Molten, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977) (sand and dirt not excluded); Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980) (duty to defend against class action lawsuit exists where there is no allegation that the damages were "sudden and accidental"); Shapiro v. Public Serv. Mut. Ins. Co., 477 N.E.2d 146 (Mass. App. Ct. 1985) (damages from fuel tank leak covered); Jonesville Prods., Inc. v. Transamerica Ins. Group, 402 N.W.2d 46 (Mich. Ct. App. 1986) (though discharge of chemical was continuous, complaint did not allege it was expected or intended, thus, insurers had a duty to defend); Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 399 N.W.2d 156 (Minn. Ct. App. 1987) (long term contaminant leakage qualifies as an "accident"); General Ins. Co. of America v. Town Pump, Inc., 692 P.2d 427 (Mont. 1984) (underground gas tank leak was not intended, therefore, insurer could not prevail on summary judgment alleging that it had no duty to defend or pay); Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990 (N.J. Super. Ct. App. Div. 1982) (long-time pollution damage at landfill was not expected or intended); Autotronic Sys., Inc. v. Aetna Life & Casualty, 456 N.Y.S.2d 504 (App. Div. 1982) (insurer had duty to defend gas station designer as the designer was not the active polluter); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603 (App. Div. 1980) (seepage from storage tanks was "sudden and accidental"); Niagara County v. Utica Mut. Ins. Co., 103 Misc. 2d 814 (Sup. Ct. Niagra County 1980), *aff'd*, 439 N.Y.S.2d 538 (App. Div. 1981) (county charged with negligence for longtime toxic chemical dumping at Love Canal area); Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294 (App. Div. 1978) (chemical spraying pollution was unintended); Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 477 N.E.2d 1227 (Ohio Ct. App. 1984) (even if chemical leaks were part of regular business practice, insurer had duty to defend); United Pac. Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262 (Wash. Ct. App. 1983) (underground gasoline leaks were unexpected and unintended).

80. Burke, *supra* note 77, at 455.

2. The Pollution Exclusion Works

In 1986, insurers prevailed when a state supreme court held the pollution exclusion clause was unambiguous. In *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*,[81] the North Carolina Supreme Court held pollution damages from Waste Management's dumping of contaminating substances into groundwater fell within the exclusion clause, the "sudden and accidental" exception was inapplicable and therefore the insurers had no duty to defend. The "sudden and accidental" exception applied to the moment of pollutant release, whereas the exclusion itself described the discharge, omission and polluting release into air, water or land.

The court held that an appropriate subject for summary judgment was the issue of whether facts alleged in the complaint were covered in the policies. The court also noted the duty to defend was broader than the duty indemnify.[82] While the duty to defend is ordinarilly measured by facts in the pleadings[83] and the duty to pay is measured by facts determined at trial,[84] the acceptance of modern notice pleadings imposes another duty on insurers. This duty, "to investigate and evaluate facts expressed or implied in the third-party complaint[s],"[85] could potentially relieve insurers of their duty to defend if facts are not arguably within the policy coverage. However, they may otherwise have a duty to defend the insured against groundless or baseless claims.[86] In *Waste Management*, the complaint alleged that (1) certain negligent acts contributed to contamination of the aquifer, (2) did not allege the acts were sudden and accidental, and (3) suggested seepage into the aquifer was gradual.[87] The deposition of a Waste Management employee describing the trash removal process suggested the dumping was both intended and expected.[88]

The court felt that, although it was possible to find ambiguity in the policy, "it strains at logic to do so."[89] The exclusion narrowed the "limitless class of events" that could be interpreted as occurrences to "nonpolluting events or polluting events that occur 'suddenly and accidentally.' "[90] The court found the focus of the occurrence language was intention and expectation, but the pollution exclusion was concerned more with the nature of the loss than the act.[91] The court stated:

81. 340 S.E.2d 374 (N.C. 1986).
82. *Id.* at 377.
83. *Id.*
84. *Id.* The court recognized, however, that there is a duty to defend if the pleadings state facts showing the alleged injury is covered by the policy, regardless of whether the insured is ultimately liable. *Id.* (citing Strickland v. Hughes, 160 S.E.2d 313, 318 (N.C. 1968)).
85. *Id.* at 378.
86. *Id.* (citing 14 COUCH ON INSURANCE 2d § 51:46 (rev. ed. 1982)).
87. *Id.*
88. *Id.*
89. *Id.* at 379.
90. *Id.*
91. *Id.* at 380-81.

"When courts consider the release alone to be the key to the pollution exclusion clause, the sudden and accidental exception can be bootstrapped onto almost any allegations that do not specify a gradual release or emission."[92] Such a construction of the clause is "so restrictive as to vitiate the 'sudden and accidental' exception."[93]

The court also pointed out "obvious" policy reasons for the pollution exclusion clause: "[I]f an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance. . . . In this case, it pays the insured to keep his head in the sand."[94] The court noted that putting financial responsibility for pollution back onto the insured, rather than the insurance company, places responsibility to protect against such pollution "upon the party with the most control over the circumstances most likely to cause the pollution."[95]

The *Waste Management* court's rejection of ambiguity of the pollution exclusion clause seems to have had some affect on the state courts,[96]

92. *Id.* at 381 (criticizing Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980)).
93. *Id.*
94. *Id.*
95. *Id.*
96. Between 1987 and 1990, more state courts ruled in favor of insurance companies, holding that pollution was excluded from coverage. *See, e.g.*, Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989) (seepage and runoff of contaminated water from strip mine pit was expressly excluded); New Hampshire Ins. Co. v. Hecla Mining Co., 791 P.2d 1154 (Colo. Ct. App. 1989) (Colorado mining act provides notice that mining company knew or should have known that pollution from its operations would occur), *rev'd*, Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Perkins Hardwood Lumber Co. v. Bituminous Casualty Corp., 378 S.E.2d 407 (Ga. Ct. App. 1989) (no duty to defend against negligence claim caused by wood fire smoke); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758 (Ill. App. Ct. 1988) (waste dumping which continued for three years excluded); Technicon Elecs. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989), *aff'g* 533 N.Y.S.2d 91 (App. Div. 1988) (long-term discharge of chemicals into a creek was not "sudden and accidental," even though it may have been lawful); County of Broome v. Aetna Casualty & Sur. Co., 540 N.Y.S.2d 620 (App. Div. 1989) (fourteen years of dumping at a landfill which had repeated leachate and pollution problems was excluded); Powers Chemco, Inc. v. Federal Ins. Co., 533 N.Y.S.2d 1010 (App. Div. 1988) (company uncovered hazards buried years ago, but exclusion applies because former owner polluted knowingly and intentionally); Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393 (Pa. Super. Ct. 1989) (methane escape from a landfill was not an abrupt discharge); Just v. Land Reclamation, Ltd., 445 N.W.2d 683 (Wis. Ct. App. 1989) (coverage excluded for continuous debris and waste pollution from a landfill); State v. Mauthe, 419 N.W.2d 279 (Wis. Ct. App. 1987) (repeated chromic acid leaks over sixteen years not covered by policy), *rev'd*, 456 N.W.2d 570 (Wis. 1990).

Many state courts, however, continued to hold the phrase "sudden and accidental" ambiguous, thus nullifying the effect of the exclusion. *See, e.g.*, Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989) ("sudden" has several reasonable meanings); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071 (Ill. App. Ct. 1989) (ambiguous regarding whether manufacturer expected or intended illegal dumping); Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. Ct. App. 1989) (toxic waste leaks occurring over three weeks from holes in tanks were unexpected and unintended, thus "sudden"); Grinnell Mut. Reins. Co. v. Wasmuth, 432 N.W.2d 495 (Minn. Ct. App. 1988) (installation of building materials which leaked toxic chemicals was negligent but not excluded); Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 399 N.W.2d 156 (Minn. Ct. App. 1987) (continuous contamination at a landfill was an

while federal courts[97] have generally adopted the analysis. Adding further to the controversy, however, some courts that hold the pollution exclusion clause is ambiguous, also hold it is a genuine issue of material fact regarding whether the particular pollution falls within the exclusion clause or its exception.[98] Therefore, the issue of coverage under a pollution exclusion clause is an inappropriate subject for summary judgment because a jury should decide material facts.

IV. *HECLA MINING CO. V. NEW HAMPSHIRE INSURANCE CO.*

A. *Facts*

Colorado filed a CERCLA complaint alleging strict liability and common law negligence claims against Asarco, Resurrection Mining Co. and the Res-Asarco Joint Venture (defendants) for cleanup costs and other damages resulting from contaminating discharges from the Yak

"accident" and may be covered); Summit Assocs. v. Liberty Mut. Fire Ins. Co., 550 A.2d 1235 (N.J. Super. Ct. App. Div. 1988) (damages from sludge pit unknown to developer when property was purchased were covered); Kipin Indus. v. American Universal Ins. Co., 535 N.E.2d 334 (Ohio Ct. App. 1987) (release of chemicals was not excluded as it was unexpected).

97. *See, e.g.*, Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co., 716 F. Supp. 1541 (D. Md. 1989) (repeated releases of chemicals was not "sudden and accidental"); C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989) (slow and gradual discharge from underground pipe excluded); American Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140 (D.S.D. 1989) (damages caused by failure to clean up "sudden and accidental" chemical discharges was not covered); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988) (dry-cleaning sludge was placed purposely on property for a number of years was not covered); Guilford Indus. v. Liberty Mut. Ins. Co., 688 F. Supp. 792 (D. Me. 1988) (damages from ruptured pipes excluded); State of New York v. Amro Realty Corp., 697 F. Supp. 99 (N.D.N.Y. 1988) (damages from solvents released over 20 years into drains were excluded); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989) (chemical releases occurring over six years at a landfill excluded from coverage); American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987) (75 years of careless pollution at salt plant was excluded); Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989) (continuous radioactive waste dumping excluded), *cert. denied*, 493 U.S. 816 (1990); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) (continuous toxic waste disposal excluded); American Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929 (W.D. Pa. 1987) (continued groundwater pollution after company was put on notice excluded).

Like the state courts, the federal courts were not unified in their rejection of ambiguity. Many federal courts also continued to interpret policies in ways which nullified the effect of the exclusion clause. *See, e.g.*, City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146 (2d Cir. 1989) (city was on notice that landfill leaked when it purchased policy, however, absent evidence of intent or knowledge that damage would flow from its acts, coverage was not excluded); Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171 (N.D. Cal. 1988) (insurance company waives "sudden and accidental" defense by agreeing to provide coverage for damages); New Castle County v. Hartford Accident & Indem. Co., 685 F. Supp. 1321 (D. Del. 1988) (landfill leakage was expected yet covered under policy); Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla. 1987) (PCBs release into aquifer was not a natural result, however, damage was covered); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394 (D.N.J. 1987) (seepage from landfill was not excluded, even though state complaint alleged the township knew or should have known of pollution).

98. *See supra* note 80 and accompanying text.

Tunnel into the California Gulch just outside of Leadville.[99] The mining tunnels were apparently improperly maintained, which caused rock and timber to collapse, debris barriers to form and impounded water to seep into the tunnel.[100] During removal of debris from the polluted water, a yellow sedimentary sludge surged from the Yak Tunnel and contaminated the California Gulch drainage basin with limonitic precipitate, turning a twenty-mile stretch of the Arkansas River orange.[101]

A third-party complaint by defendants against Hecla alleged the mining company discharged hazardous substances into the tunnel from 1938 to 1983.[102] Since NH and Industrial insured Hecla from 1974 through 1985, Hecla asked both companies to defend the lawsuit.[103] The insurance policies provided defense and liability coverage for damage resulting from unexpected and unintended occurrences. Nonetheless, pollution damages were not covered because the policies contained pollution exclusion clauses. Therefore, the insurance policies covered only sudden and accidental pollution.[104] The insurance companies argued the California Gulch contamination was reasonably foreseeable and, thus, not covered under the policies because the pollution was expected and not an "occurrence."[105] In the alternative, they argued, even if the pollution was unexpected and unintended, the discharge occurred over a long period of time, so the pollution was not "sudden and accidental" and thus they did not have a duty to defend Hecla against the state's CERCLA claims."[106]

B. *Procedural History*

When Hecla was joined as a third-party in the complaint and requested the insurers to defend, Industrial denied coverage and filed for declaratory judgment[107] to determine whether it had a duty to defend and indemnify[108] Hecla under the policies. NH subsequently intervened in the declaratory judgment action.[109] Helca refused to proceed with discovery in the declaratory judgment action and prevailed on both its Motion for Protective Order and Opposition to Plaintiff's Motion to Compel. Hecla then moved for summary judgment.[110] Hecla's success in evading discovery meant the court had only the facts alleged in the pleadings with which to determine summary judgment. Although Hecla

99. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1085 (Colo. 1991).
100. *Id.* at 1085 n.3.
101. *Id.* at 1085.
102. *Id.* at 1085-86.
103. *Id.* at 1086.
104. *Id.* at 1086-87.
105. *Id.* at 1087.
106. *Id.*
107. *Id.* at 1086. Declaratory judgment actions to determine preliminary matters, such as insurance coverage and the duty to defend, are authorized by COLO. R. CIV. P. 57; COLO. REV. STAT. §§ 13-151-101 to 115 (1987).
108. *Hecla*, 811 P.2d at 1086. The focus of this Note is on the duty to defend. A detailed discussion of the duty to indemnify is beyond the scope of this Note.
109. *Id.*
110. *Id.* at 1095.

admitted regular hazardous discharges occurred in its usual mining operations, it argued this was an "occurrence" because the resulting damage was unintended.[111] The District Court held for Hecla finding both NH and Industrial had a duty to defend in the CERCLA action, but the duty to indemnify was not ripe for resolution.[112]

The Colorado Court of Appeals reversed and held Hecla knew or should have known of a substantial probability that its mining activities would result in environmental damage.[113] Therefore, the California Gulch contamination was not an occurrence because an " 'occurrence' is an event whose results are both unintended and unexpected."[114] The pollution damages can not be unexpected "if they are the ordinary consequences of those acts."[115] The court held the Colorado Mined Land Reclamation Act (Act) provided constructive notice to Hecla, and other mining operators, that mining activities "could cause environmental damage."[116] This holding precluded the mining companies from asserting the defense that they did not intend pollution damages to result from mining.

The court noted the purpose of the Act was to "aid in the protection of wildlife and aquatic resources . . . and promote the health, safety and welfare of the people of this state."[117] The Act, one of two statutes which regulate mining in Colorado,[118] applies to mining and prospecting operations for all minerals and regulates[119] land use for mine location and related "environmental and socioeconomic impacts"[120] by requiring that prospecting notices,[121] financial warranties[122] and reclamation permits[123] be filed before prospecting.[124] The court of appeals

111. New Hampshire Ins. Co. v. Hecla Mining Co., 791 P.2d 1154, 1156 (Colo. Ct. App. 1989), *rev'd*, 811 P.2d 1083 (Colo. 1991).

112. *Hecla*, 811 P.2d at 1086.

113. *New Hampshire*, 791 P.2d at 1157.

114. *Id.* at 1156.

115. *Id.*

116. *Id.* at 1157.

117. *Id.* (citing COLO. REV. STAT. § 34-32-101 (1984)).

118. *See supra* note 2. Minerals include oil shale, sand, soil and gravel, but exclude oil and gas. COLO. REV. STAT. § 34-32-103(7) (1984).

119. With the Department of Natural Resources, the Division of Mined Land Reclamation administers the Act and its regulations. 2 COLO. CODE REGS. § 407-1 (1990).

120. *See* C & M Sand & Gravel v. Board of County Comm'rs, 673 P.2d 1013, 1017 (Colo. Ct. App. 1983) (interpreting the Act as allowing local regulation, by permit, of some aspects of land use for mining). Certain restrictions apply to mining operations within national parks, wildlife habitats, trails, scenic rivers or wilderness preservation systems and recreation areas or facilities. *See* COLO. REV. STAT. § 34-32-110(2); 2 COLO. CODE REGS. 407-1 § 3.2.

121. COLO. REV. STAT. § 34-32-113(1) (Supp. 1991).

122. *Id.* § 34-32-113(4).

123. *Id.* § 34-32-109(1). Mining operations are any "development or extraction of a mineral from its natural occurrences on affected land." *Id.* § 34-32-103(8). Mining operations encompass processing, transporting and disposal of wastes from underground mining. *Id.*

124. Prospecting is the search for or investigation of a mineral deposit and includes building access roads, easements or other facilities that may cause a greater disturbance to land than "ordinary lawful use . . . by persons not prospecting." *Id.* § 34-32-103(12). If the notice and warranty requirements are met, the Board notifies the prospectors of additional requirements for land reclamation, inspects the land and releases the financial war-

reasoned the Act's extensive environmental standards and restrictions, as well as the Act's legislative declaration to protect wildlife and aquatic resources, gave notice to mining operators that their activities could cause environmental damage.

C. *Majority Opinion*

The Colorado Supreme Court granted certiorari to decide whether CGLs with pollution exclusion clauses require insurers to defend CERCLA actions for pollution damages resulting from mining activities. Before construing the "sudden and accidental" language of the pollution exclusion clause, the court first noted an insurer's broad duty to defend. CGLs impose two distinct duties on insurance companies—the duty to defend a lawsuit that falls within the policy language and the duty to indemnify.[125] The duty to defend "is an area of significant dispute"[126] due to the growing potential liability imposed by environmental statutes and the significant defense costs incurred in defending claims.

How this defense duty arises is another hotly debated issue. The duty to defend is usually established in one of two ways—either by looking at the four corners of the complaint or by evaluating extrinsic facts beyond the allegations of the complaint.[127] Under the four corners test adopted by the *Hecla* court, an insurer has a duty to defend if, on its face, the underlying complaint states any claim that may potentially be covered under the policy.[128] Therefore, if an insurer can show the complaint unambiguously excludes coverage, then there is no duty to defend.[129] Insurers also have a duty to investigate facts that might show probable liability before denying its duty to defend.[130] Whether these extrinsic facts, elicited in the investigation, can be used to determine the duty to defend is questionable.[131] Some jurisdictions allow use of factual evidence extrinsic to the complaint's allegations when determining the duty to defend.[132] In Colorado, before the *Hecla* decision, insurers

ranty when there is an acceptable reclamation. *Id.* § 34-32-113(5). All applications for reclamation permits must meet stringent standards, such as criteria for minimized distress to water systems and protection of ditches and gutters from pollution. *See* 2 COLO. CODE REGS. 407-1 Rule 6; COLO. REV. STAT. § 34-32-116. The Board is authorized, along with the Colorado Bureau of Mines, to inspect reclaimed lands and prospecting activities to assure compliance with the Act. *Id.*

125. Rosenkranz, *supra* note 34, at 1241 n.20.

126. Michael D. Glatt & Lawrence Hobel, *Liability Insurance Disputes, in Commercial Law and Practice Course Handbook Series: Techniques of Self Insurance*, 400 PRACT. L. INST. 343 (1986).

127. Stewart McNab, *The Duty to Defend in Colorado After Hecla Mining*, 20 COLO. LAW. 2095 (1991).

128. Glatt & Hobel, *supra* note 126, at 345 (citing C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479, 483 (3d Cir. 1981).

129. *Id.* (citing Bandy v. Avondale Shipyards, Inc., 458 F.2d 900, 902 (5th Cir. 1972).

130. *Id.* (citing Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guar. Co., 142 Cal. Rptr. 681 (Ct. App. 1977)).

131. *Id.* (citing Green Bus Lines v. Consolidated Mut. Ins. Co., 426 N.Y.S.2d 981, 987 (App. Div. 1980)).

132. Randy Mott et. al. *Hazardous Waste Claims Under Comprehensive General Liability Poli-*

could proceed with discovery of extrinsic facts during a declaratory judgment action. Whether these facts could be used to establish the duty to defend was previously within the discretion of the trial court.[133] The *Hecla* court's adoption of the four corners test precludes the trial court from considering extrinsic facts.

The *Hecla* court held the duty to defend and the duty to indemnify are separate and distinct.[134] Avoiding the duty to defend is a heavy burden because the duty arises whenever facts alleged in the underlying complaint arguably fall within coverage, which if sustained would impose liability. The court introduced a new twist of procedure in Colorado insurance law—insurers seeking to avoid the duty to defend in suits involving intentional pollution damages, which would be excluded from coverage under the insurance policies, should not seek a declaratory judgment decision before the trial of the underlying claim. Insurers risk losing a summary judgment action if they proceed with a declaratory judgment claim before facts are discovered extrinsic to the complaint. Formerly, Colorado insurance law allowed declaratory judgment proceedings and discovery of extrinsic facts simultaneous with the underlying claim. The *Hecla* court deviated from this practice and granted summary judgment to Hecla based on this new procedure.

Finally, the court, while interpreting the contract language, noted that principles of contract law require ambiguous language to be construed against the party who drafted the agreement, here, NH and Industrial. The court held the pollution exclusion language did not exclude anything that was "unexpected and unintended." The California Gulch contaminating surge was an "occurrence" covered under the policies because the CERCLA complaint did not allege either Hecla expected or intended the environmental damage or that the damage would flow directly and immediately from its mining operations.[135] The court's construction of the contract language provided coverage for pollution damages that were "unexpected and unintended" occurrences, unless Hecla knew the pollution damages would result and they were not "sudden and accidental." Under the "sudden and accidental exception," the court held that if the pollution could have occurred suddenly and accidentally, then the insurer must defend. Because the words "sudden and accidental" in the exception were not defined in Hecla's policies, the court interpreted them.

The court undertook a complex analysis of the possible meanings of "sudden and accidental" with relevant case law and concluded "sudden" could describe either the unexpectedness of the event or its dura-

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cies, in Litigation and Administrative Practice Course Handbook Series: Litigation - Hazardous Waste Litigation 1986, 301 PRACT. L. INST. 149 (1986) (citing Gray v. Zurich Ins. Co., 419 P.2d 168 (Ca. 1966)).

133. *See* Troelstrup v. District Ct., 712 P.2d 1010 (Colo. 1986); Hartford Ins. Group v. District Ct., 625 P.2d 1013 (Colo. 1981).

134. *Hecla*, 811 P.2d at 1086 n.5.

135. In a CERCLA action, a strict liability claim, the plaintiff does not need to allege the environmental damages are actually intended and expected.

tion and, therefore, the word was ambiguous. The court held the sudden and accidental exception allowed coverage unless Hecla knew the damages would flow directly from its intentional actions. The policies' pollution exclusion clauses for cleanup and damage caused by pollution were inapplicable to the duty to defend Hecla in the CERCLA action because the CERCLA strict liability claim purportedly did not allege intentional or expected acts.

The court of appeal's policy interpretation of the Act put mining companies in the precarious position of having no defense against liability for future intentional pollution damages by virtue of constructive notice under the Act. The supreme court's decision was influenced by the need to reverse this interpretation of the Act. The court held the Act did not provide notice to mining companies, as a matter of law, that their activities could cause environmental damage, which would preclude them from recovery under insurance policies. Thus, the court proclaimed mining a necessary and proper activity and forced insurers to defend against CERCLA claims. The *Hecla* court sought to promote continued development of the mining industry, rather than protect wildlife and aquatic resources from mining pollution as the court of appeals had attempted to do by ruling against Hecla in the proceedings below.[136]

D. *Dissenting Opinion*

The dissent would not have granted summary judgment until more facts were elicited in discovery. The duty to defend under the pollution exclusion clause would have been determined either when discovery was complete or in a subsequent action after the trial of the underlying claim. Rather than mandate this choice as in the majority opinion, the dissent would have allowed discretion to look beyond the allegations of the complaint when defining the duty. The trial judge would then have discretion to hold the declaratory judgment action in abeyance until resolution of the underlying claim. Insurance companies could defend under a reservation of rights and later seek reimbursement for costs along with the determination of their duties to defend.

The dissent considered the duty to defend a "fact specific" case-by-case determination. The dissent detailed several rationales and provided extensive authority for looking beyond allegations in the underlying complaint in order to determine the duty to defend. First, the dissent noted that it is inappropriate to determine an insurer's duty to defend based solely on allegations in a CERCLA complaint since the state does not need to allege either a party intended or expected to pollute or that the discharges were sudden and accidental. Second, in Hecla's case, there was strong reason to believe facts would be elicited during discovery that would exclude the pollution damages from coverage because some allegations inferred intentional behavior on Hecla's

136. *See supra* note 3 and accompanying text.

part. Third, any party with ownership interests in the contaminated site could be held strictly liable, regardless of fault or intent, yet intent was important to the pollution damage coverage issue. In a CERCLA complaint, whether the pollution damage is "unexpected and unintended" or "sudden and accidental" is immaterial. Therefore, the complaint allegations do not resolve the material issue of fact regarding coverage under the pollution exclusion clause. The dissent found summary judgment should not have been granted until issues of fact regarding coverage were resolved.

V. ANALYSIS

A. Hecla's *Procedural Deviation*

The primary points of contention in Hecla's motion for summary judgment were the scope of the policy coverage and the duty to defend under the policy. The resolution of the issues in Hecla's motion for summary judgment involved: (1) construing the contract language (the occurrence limitation, the pollution exclusion clause and its exception); (2) determining whether events alleged in the complaint, or other facts discovered, were covered under the policies; and (3) establishing the duty to defend a CERCLA lawsuit based on undisputed facts. In making its decision, the *Hecla* court departed from established Colorado precedent,[137] which previously allowed insurance companies to seek a determination of factual issues regarding coverage in a declaratory judgment action before defending the underlying liability claim. When the court granted Hecla's motion for summary judgment, it denied the insurers an opportunity to show coverage did not exist. Further, the court based its summary judgment decision on the *allegations* in the complaint, rather than *undisputed facts*.

Deciding policy coverage and insurers' duties under policy exclusions may not be an appropriate subject for summary judgment. In *United States Fidelity & Guaranty Co. v. Colorado National Bank of Denver*,[138] Judge Weinshienk advised there was a genuine issue of fact whether the events fell under the pollution exclusion clause. Relying on *City of Northglenn v. Chevron U.S.A.*, the court asked "[d]id the word 'accident' mean something different than 'occurrence'? Is it an accident whether pollutants in a pond leak out and pollute the ground waters of the state of Colorado?"[139] The court concluded that "accident" should not be given a "very narrow technical definition" as a matter of law. A jury should construe the words "sudden and accidental" in determining whether the factual events fell within the exclusion or its exception.

In *Hecla*, the dissent expressed similiar sentiments regarding the need to gather facts before deciding the material issues in the summary

137. *Troelstrup*, 712 P.2d at 1012.

138. No. 86-Z-1033 (D. Colo. filed Nov. 4, 1988) (unreported).

139. *Id.*; *see also* City of Northglenn v. Chevron, U.S.A., 634 F. Supp. 217 (D. Colo. 1986).

judgment action.[140] Even the court in *Waste Management*, which decided the coverage issue as a matter of law, ruled for the insurance company because facts produced in discovery showed the pollution damages were intended. This evidence, elicited in deposition testimony of a Waste Management employee, greatly influenced the court.

Learning the lesson from *Waste Management*, however, Hecla increased its potential for summary judgment by strategically avoiding discovery, which might have elicited facts showing Hecla's acts fell outside coverage. Instead, Hecla avoided the coverage issue by seeking a determination only on the duty to defend, based on allegations and not facts. Since the mining company prevailed on the defense issue only, the insurance company could, presumably, seek a judgment on the coverage issue later, after a substantial outlay of costs defending Hecla against the CERCLA claim. Insurers may still litigate coverage issues against insureds, but only in declaratory judgment actions subsequent to resolution of underlying suits.

NH and Industrial sought a factual determination of both issues—coverage and duty to defend—because they understood the duty to defend coexisted with the duty to indemnify. The *Hecla* court held that only the duty to pay is a question of fact and the duty to defend could be decided as a matter of law. Thus, insurers with no obligation to pay still have a duty to defend. However, insurers may do so under a reservation of rights, and later seek reimbursement for defense costs, if coverage is ultimately denied.

This procedure forces insurers into an ineffective and unproductive "wait-and-see" perspective. They cannot file a declaratory judgment action unless the facts alleged show that no coverage existed. The insureds will be granted a defense, even though their intentional actions may be excluded from coverage. Even if facts outside the complaint show pollution damages were intentional and therefore excluded from coverage, insurers may still have to defend and later seek reimbursement if those same facts are not alleged in the complaint.

This procedure is inefficient for both insurer and insured.[141] Insureds still risk being sued by insurers for reimbursement of defense costs should they ultimately lose the declaratory judgment action after trial. Rather than proceed with discovery in the earlier declaratory judgment action, the parties expend time, money and resources (both theirs and the state attorney general's prosecuting the underlying environmental damage claim) until facts demonstrate how the pollution was caused and whether it is excluded from coverage. The procedure also discour-

140. *See Hecla*, 811 P.2d at 1092-93 (Mullarkey, J., dissenting). This is a position shared by many other courts. *See, e.g.*, American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1489, 1490 (10th Cir. 1991) (in deciding whether a duty to defend exists, a court may look to allegations in the complaint and at any facts that the insurer reasonably could discover); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 32 (1st Cir. 1984) (court may review independant evidence in a determination of duty to defend "if the complaint . . . does not on its face establish lack of coverage.").

141. *See* McNab, *supra* note 127, at 2096.

ages settlements, which might be in an insured's best interest, because of the insurer's interest in issues of res judicata and collateral estoppel for its subsequent action against the insured.[142]

B. Hecla's *Contract Construction*

The court held the contaminating surge was an occurrence under the CGL. Moreover, the insurers had a duty to defend because the CERCLA complaint asserted strict liability and did not assert that the insured expected or intended the damages to result from its mining activities. The occurrence limitation in Hecla's policies, merging with the "sudden and accidental" language, excluded only damages that the insured knew would flow directly and immediately from its intentional act.

The "sudden and accidental" language could have been a turning point for the court. A reliable construction goes "beyond semantics" because: "[O]ccurrence relates to the anticipation of an event—whether or not it was intentional or expected. The pollution exclusion . . . describes the event—not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitously."[143] With this guideline, pollution damage can be correctly categorized. In the *Hecla* dispute, the occurrence was the anticipated event, Hecla's continuous and repeated discharges into the tunnel, whether those discharges were intended or expected. Under the pollution exclusion clause, the liability for the contaminating pollution caused by the surge is excluded from coverage. The exception allows for coverage only if the event that caused the pollution damage is both "sudden and accidental."

For example, an occurrence might be the transportation of hazardous substances across town, the damage might be pollution emissions from a leak in the truck. Although the transporting of hazardous substances can be continuous and damages from such may be covered, pollution liability resulting from a leak will be excluded if not sudden and accidental. Depending on how the leak occurred, the pollution damages may or may not be covered by the insurance policy. Leaks occurring from improperly sealed tanks may not be covered, but leaks that eventually result from weak sealants may be. A factual determination should be made as to whether the resulting pollution is sudden and accidental and whether there is coverage for that pollution.

NH and Industrial made a similar argument in *Hecla*. The insurers argued the CGLs excluded coverage for pollution damage unless the release of the pollutants was both sudden and accidental. The insurers contended a common sense interpretation of the plain language of the policy mandated that ongoing releases from mining operations for a to-

142. Part of the purpose of CERCLA is to increase settlements: "The fact that the statute is designed to foster settlements reduces further the chance that a determination of intent, expectedness, suddeness or accidental nature of alleged damages or discharges would be determined in the underlying CERCLA case." *Hecla*, 811 P.2d at 1095 n.2 (Mullarkey, J. dissenting).

143. Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 382 (N.C. 1986).

tal of ninety years "were emphatically not sudden."[144] Despite this common sense argument, Hecla contented that the insurers had a duty to defend because the complaint allegations did not allege that Hecla intended environmental harm. "Therefore, the District Court was correct in ruling there is a duty to defend by the insurers here since CERCLA is a strict liability statute and mere ownership property which in some way contributes to environmental damage is sufficient for liability under the statute."[145] What this argument fails to consider is that Hecla's liability under the statute is not at issue in the summary judgment motion. What is at issue is the insurer's liability under the pollution exclusion clause. Hecla's argument—that the CERCLA complaint did not allege Hecla's specific acts caused various hazardous substances to be discharged into the Yak Tunnel, which "injured and destroyed natural resources"[146]—does not resolve the factual question of whether the pollution damage was covered in the insurance policies.

While Hecla contended the complaint showed no intentional acts, the insurers contended the complaint showed that the releases of pollutants were "the antithesis of 'sudden.' "[147] Quoting the complaint, the insureds asserted the pollutants were repeatedly and continuously released " 'into the environment, including surface waters, ground waters, air and lands within the State of Colorado, beginning in approximately 1895 and continuing to the present.' "[148] When emissions occur on a regular basis or in the course of business, the sudden and accidental exception should not apply. Although an occurrence is distinct and sudden, such an occurrence may not be *accidental.* If an accident keeps recurring, intent should be inferred.[149]

Facts alleged in the *Hecla* complaint showed a contribution of contaminating materials into the tunnel over a period of over 15 years, which eventually released into the California Gulch, making the water hazardous for any human use. The plain terms of the policy exclusion compared with the pleadings, which neither expressed or implied the releases were sudden, showed the alleged occurrences may have remained outside the policy coverage. Yet despite plain language in policies, courts still hold sudden *and* accidental exceptions can mean either sudden *or* accidental and sudden can mean gradual.[150]

"[C]ourts really hate polluters but they hate insurers even

144. Brief of Amicus Curiae Insurance Environmental Litigation Association, New Hampshire Ins. Co. v. Hecla Mining Co., 791 P.2d 1154 (Colo Ct. App. 1989) (No.CA-87-0092), *rev'd,* 811 P.2d at 1083 (Colo. 1991).

145. Answer Brief of Defendant-Appellee Hecla Mining Co. to Brief of Appellant New Hampshire Ins. Co. at 8, *New Hampshire Ins. Co.* (No. CA-87-0092).

146. Reply Brief of Appellant Industrial Indemnity Co. at 4-5, *New Hampshire Ins. Co.* (No. CA-87-0092).

147. Brief of Amicus Curiae at 6.

148. *Id.* (quoting Amended Complaint at ¶ 14).

149. Great Lakes Container v. Union Fire Ins. Co., 727 F.2d 30, 34 (1st Cir. 1984) (routine discharge that was part of a continuous negligent practice was not "sudden").

150. The court was persuaded by Hecla's "parade of horribles." *See* Petition for Certiorari at 11-12, *Hecla* (No. 89-SC-646).

more."[151] Given this attitude towards insurance companies and the new social policy to find a financially solvent party to fund environmental cleanups, its hardly surprising courts continue to expand coverage when interpreting insurance contracts in environmental litigation. However, traditional insurance law disfavors insuring intentional or reckless behavior. In addition, the *Hecla* court's new procedure will not guarantee that insurers will fund cleanups.

In *Hecla*, the court tipped the scales against the public's environmental concerns. Viewed in economic terms the decision is of doubtful value. It allows mining companies to further externalize pollution cleanup costs, thereby encouraging the mining industry to pollute at a greater level. It forces insurers to defend against possible intentional pollution damages and provides no incentive for the mining companies to stop polluting. It does not guarantee insurers will pay for cleanup because the pollution damage may be excluded from coverage in a subsequent declaratory judgment action. The literature on law and economics reasons that societal wealth is maximized when financial responsibility for resulting harm is placed on the party in the best position to compare the benefits derived from the activity (mining) with the costs required to prevent the harm (pollution) resulting from an activity. This is because the party who knows the risks can best evaluate and, if efficient, avoid them.[152] Mining companies and other industrial polluters did not win the battle in *Hecla*, which granted a broad duty to defend, because the companies remain in the economic labyrinth created by decisions that allow industry to avoid internalizing externalities.

Therefore, the *Hecla* holding does not really promote mining because the laws of economics dictate the same result—insureds will pay today for cleanup, or tomorrow for high insurance and litigation costs. Insurers will inevitably be forced to either abandon coverage for pollution altogether, increase premiums tremendously or provide coverage only in states favorable to insurers.[153] The dearth of insurance coverage or the alternative exorbitant premiums for pollution damages will in turn force perpetual industrial polluters to bear their own waste cleanup costs. The companies may find that their concern for the environment and incentives for environmental protection may increase as their insurance and litigation costs increase.

In the meantime, courts unwittingly have created a new victim—the

151. Rosenkranz, *supra* note 34, at 1240 n.16. In keeping with this "favoritism toward the insured," courts cite three rules which embody this principle. *Id.* First, insurers have the burden to prove noncoverage. *Id.* (citing Commercial Union Ins. Co. v. Albert Pipe & Supply Co., 484 F. Supp. 1153, 1155 (S.D.N.Y. 1980)). Second, ambiguity must be construed in favor of insured, especially when exclusion clauses are involved. *Id.* (citing 13 J. APPLEMAN, INSURANCE LAW PRACTICE § 7401 (Berdal ed. 1962)). Third, the insurers must defend the entire suit if a single allegation in the underlying complaint is covered in the policy. *Id.* (citing 7C J. Appelman, *supra* § 4684).

152. GUIDO CALABRESI, THE COST OF ACCIDENTS 150-52 (1970).

153. Insurance companies faced with choice of law decisions in a state with broad construction precedents such as Colorado will insert into policies a clause that all litigation take place in states without such precedents.

environment.[154] State and federal government attacks on pollution will be frustrated by the *Hecla* decision for two reasons. First, industrial polluters now have a deep-pocket defender, whose interest in the subsequent declaratory judgment action may conflict with settlement of a CERCLA claim. Second, governmental expenditure of state funds to prosecute with hopes of having insurers pay for the environmental cleanup does not guarantee insurers will ultimately pay because, under the *Hecla* procedure, insurers may still be successful in the subsequent declaratory action and policy coverage may be excluded.

VI. Conclusion: Does the Broad Duty to Defend Promote Either the Prevention of Pollution or the Mining Industry?

Intensified public awareness of hazardous industrial by-products led Congress to enact strict environmental laws[155] imposing financial liability on polluters for damages. Industrial polluters, such as mining companies, first sought relief from astronomical cleanup costs by claiming pollution damages were covered under their CGL insurance policies.[156] Insurers, responding to an onslaught of litigation[157] and catastrophic liability, first denied coverage and argued cleanup costs were not "legal damages" covered under the policies.[158] Although the issue is far from resolved, judicial construction of insurance policy language has consistently expanded coverage, compelling insurers to redraft policies or find themselves liable for pollution they had not intended to insure. When insurers endeavored to expressly limit liability with pollution exclusion clauses, courts were flooded with more litigation. Rather than take steps to prevent future pollution damages, industry tried to escape direct responsibility for environmental damages by again seeking judicial expan-

154. Rosenkranz, *supra* note 34, at 1240.

155. Christine F. Ericson, Comment, *Excluding the Pollution Exclusion: City of Johnstown, New York v. Bankers Standard Insurance Co.*, 38 Wash. U. J. Urb. & Contemp. L. 287 n.1 (1990) (citing David Sive, *Forward: Roles and Rules in Environmental Decisionmaking*, 62 Iowa L. Rev. 637 (1977) (describing environmental interests groups established to effect policy changes)).

156. For a detailed analysis of the litigation in this area, see Hourihan, *supra* note 64. For a brief overview see *supra* notes 48-49 and accompanying text.

157. Today there are literally hundreds of these claims. The following are examples demonstrating the proportions of the litigation explosion: the Shell Oil Company is suing 250 of its insurers, the Westinghouse Electric Corporation and one of its subsidiaries is suing more than 140 of its insurers, Allied Signal Incorporated is suing 120 of its insurers, the Union Carbide Corporation is suing 115 of its insurers, and the Diamond Shamrock Chemical Corporation is suing 100 of its insurers.

Pochop, *supra* note 21, at 300 n.10 (citing Diamond, The $700 Billion Cleaning Bill; Hazardous Waste Sites, 1 Ins. Rev. 30 (1989)).

158. The drafters of both insurance policies and environmental statutes and regulations believed that their product would best serve the needs of society in dealing with the risks of doing business and protecting the environment. The resulting collision in assessing liability for environmental damages has proven bitter and controversial. The determination of liability for environmental damages to real property is one of the greatest controversies facing industry and the judiciary in the past decade.

Meridan, *supra* note 27, at 30A-1 to 30A-2.

sion of coverage. The resulting collision course has generated pollution litigation as ubiquitous as the pollution itself. As long as the mining industry continues to externalize pollution liability costs, it remains both economically and environmentally inefficient. This is especially true under the new *Hecla* procedure because there is no guarantee that the insurers will fund cleanup. The mining industry may eventually spread the risk of pollution liability to the public through an increase in insurance premium costs. However, by casting the allocation of environmental cleanup costs back onto the insurance contract bargaining table, the *Hecla* decision forces insurers to further clarify intent when drafting insurance policies, rather than leaving courts to interpret contract exclusionary language.

Diana A. Cachey

WARNING: DENIAL OF FETAL PROTECTION UNDER TITLE VII MAY BE HAZARDOUS TO THE HEALTH OF INDUSTRY AND SOCIETY

INTRODUCTION

Over the past ten years, an increasing number of chemicals used in the workplace have been identified as potential reproductive hazards.[1] Many employers have responded to these risks by adopting "fetal protection policies,"[2] which prohibit fertile women[3] from working in toxic environments.[4] These fetal protection policies have created a conflict with the prohibition against sex discrimination. Because these policies affect only women's jobs, the courts consider this conflict exclusively in the context of Title VII of the Civil Rights Act of 1964.[5] *UAW v. Johnson Controls, Inc.*[6] provided the U.S. Supreme Court with the opportunity to resolve the conflict between employers protecting women's reproductive health and violating Title VII by discriminating on the basis of sex. Instead, the Court's holding left industry with no means of shielding its female workers from fetal toxics without violating Title VII, and with no way of protecting itself against potential future liability.

This Comment examines the Supreme Court's recent decision in *Johnson Controls*.[7] Part I explores the background of Title VII, its amendment by the Pregnancy Discrimination Act[8] and the confusion of the federal circuit courts on the proper application of Title VII for determining the validity of fetal protection policies. Part II addresses the facts of the case and the reasoning adopted by the Court. Part III focuses upon a general analysis of the case, discusses how the Court's de-

1. Marcelo L. Riffaud, Comment, *Fetal Protection and UAW v. Johnson Controls, Inc.: Job Openings for Barren Women Only*, 58 FORDHAM L. REV. 843 (1990).

2. Employers who have adopted fetal protection policies include American Cyanamid Co., B. F. Goodrich Co., Dow Chemical Co., Environmental Protection & Aeration Systems, Inc., Firestone, General Motors Corp., Monsanto, Olin Corp. and St. Joe Minerals Corp. *See* Riffaud, *supra* note 1, at 843 n.3.

3. Fertile women have been defined as all women who are not certifiably sterile. *See* UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1200 (1991). *See also* Wright v. Olin Corp., 697 F.2d 1172, 1182 (4th Cir. 1982) (all women between ages 5 and 63 are assumed fertile).

4. Several commentators have discussed fetal protection policies. *See generally* Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981); Meredith L. Jason, Note, *International Union v. Johnson Controls, Inc.: Controlling Women's Equal Employment Opportunities Through Fetal Protection Policies*, 40 AM. U.L. REV. 453 (1990); Pendleton E. Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal In the Wake of International Union, UAW v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110 (1990); Riffaud, *supra* note 1; Alan C. Blanco, Comment, *Fetal Protection Programs Under Title VII - Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755 (1985).

5. 42 U.S.C. § 2000e (1988).

6. 111 S. Ct. 1196 (1991).

7. *Id.*

8. 42 U.S.C. § 2000e(k) (1988).

cision may affect the future of businesses whose operations expose workers to fetal-toxic hazards and comments on society's interest in the problems the decision may create.

I. BACKGROUND

A. *Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of race, sex, national origin or religious beliefs in hiring and employment practices.[9] The provision was passed to protect racial minorities from historical barriers to employment.[10] In an unsuccessful attempt to defeat the bill, Congress added sex to the list of prohibitions against discrimination.[11] Since the bill's enactment, courts have vigorously defended women's rights against job discrimination.[12] Under Title VII, two major claims of discrimination have emerged: disparate treatment and disparate impact.[13]

Disparate Treatment

Disparate treatment claims arise in two situations. The first is facial or overt discrimination, which occurs when an employer adopts a practice or policy of treating women differently from men on the basis of sex.[14] The only affirmative defense available to an employer for an allegation of facial discrimination is the existence of a bona fide occupational qualification (BFOQ).[15] This statutorily created exception permits discrimination on the basis of sex only when it is "reasonably necessary to the normal operation of that particular business or enterprise."[16]

The Supreme Court has narrowly interpreted the BFOQ exception.[17] The exception has been found to justify discrimination only if the employer has a reasonable cause to believe "that all or substantially all women would be unable to perform safely and efficiently the duties of

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9. 42 U.S.C. § 2000e-2(a) (1988).

10. Hamlet, *supra* note 4, at 1112.

11. *Id.*

12. *Id.*

13. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (distinguishing disparate treatment from disparate impact claims). *See also* Segar v. Smith, 738 F.2d 1249, 1265-68 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (comparing disparate treatment and disparate impact theories).

14. Williams, *supra* note 4, at 668.

15. 42 U.S.C. § 2000e-2(e) (1988). The statute reads in pertinent part:

> (e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . .

Id.

16. *Id.*

17. *See* UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1204 (1991) (citing Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-25 (1985)).

the job involved."[18] For example, the courts have allowed the BFOQ because of safety concerns (the "safety exception"), but stressed that such exceptions are applied only in narrow circumstances.[19] The safety exception has been applied to cases in which there is a concern for the safety of a third party that is indispensable to the business in question. In *Dothard v. Rawlinson*,[20] the Court determined that hiring only male guards in a maximum security men's prison was a BFOQ because the ability to keep order and maintain security was essential to the job where a woman's presence could pose a threat to herself, other security personnel and the inmates.[21] Justice Marshall, in his minority opinion in *Dothard*, emphasized that although he did not approve of the "sex discrimination condoned by the majority," he felt that it was fortunate the majority decision was carefully limited to the facts, namely, the "inhuman conditions in Alabama prisons."[22]

The Court also found a safety exception in *Western Air Lines, Inc. v. Criswell*,[23] a case arising under the Age Discrimination in Employment Act of 1967.[24] Affirming the Ninth Circuit, the Court held that to establish a BFOQ an employer must show, among other things, that age can be legitimately used as a safety-related job qualification when it is not practicable to deal individually with older employees.[25] Such job qualification must be "reasonably necessary to the essence of his business [as] here . . . safe transportation . . . ."[26] Accordingly, courts have upheld facial sex discrimination in very limited situations.

The second situation in which a disparate treatment claim arises is pretextual discrimination. This occurs when an employer adopts a practice or policy that is facially neutral but the employee asserts that the policy is only a pretext for intentional discrimination on the basis of sex.[27]

Disparate Impact

A disparate impact claim, by contrast, arises when an employer's facially neutral policy has a disproportionately adverse effect on one group (such as women) and not on another (such as men) and is not

18. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

19. Dothard v. Rawlinson, 433 U.S. 321, 346-47 (1977) (Marshall, J., concurring in part and dissenting in part).

20. *Id.* at 321.

21. *Id.* at 336-37.

22. *Id.* at 346-47 (Marshall, J., concurring in part and dissenting in part).

23. 472 U.S. 400 (1985).

24. 29 U.S.C. §§ 621-634.

25. *Id.* at 414.

26. *Id.* at 413 (quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (1976)). For cases failing to find a BFOQ safety exception, see Johnson v. Mayor of Baltimore, 472 U.S. 353 (1985) (mandatory retirement age for firefighters does not automatically constitute a BFOQ in an age discrimination case); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (telephone company failed to prove that heavy lifting and other job requirements constituted a BFOQ).

27. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Jason, *supra* note 4, at 460.

justified by a business necessity.[28] This might occur, for example, when an employer bases an employee's salary on past salary.[29] A disparate impact may thus be created in a world in which women have historically been paid less than men.[30]

Unlike disparate treatment claims, the employer's motive is not significant in disparate impact claims because the focus is on the consequences of the employer's practices.[31] The only defense available to the employer for a disparate impact claim is the judicially created business necessity defense.[32] Under the business necessity test, the employer must prove that: (1) there is an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business; (2) the practice effectively carries out the business purpose it is alleged to serve; and (3) there are no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or at least equally accomplish it, with less disparate impact.[33]

Burdens of Proof

In *McDonnell Douglas Corp. v. Green*,[34] the Supreme Court set forth a three step scheme for analyzing a disparate treatment case: (1) the employee's prima facie showing, (2) the employer's articulated reason and (3) a pretext.[35] The three steps address only the element of intent to discriminate for which the employee bears the ultimate burden of proving that she has been the victim of intentional discrimination.[36] In establishing her prima facie case, the employee must show that she was treated differently than a person from another gender or race, that the employer intended to discriminate and that the difference in her treatment was caused by the employer's intent to discriminate.[37]

An employer can defend an employee's disparate treatment charge by arguing that there was a "legitimate, nondiscriminatory reason for the [plaintiff's] rejection."[38] The employer must actually articulate a reason for the action because a simple denial of the intent to discriminate will not suffice.[39] The "real" limit on what will be accepted as the employer's reason is credibility.[40] The less the reason is based on "job

28. International Bd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).
29. Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 801 (1985).
30. *Id.*
31. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
32. *Id.* at 431 (establishing business necessity defense).
33. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).
34. 411 U.S. 792 (1973).
35. *Id.* at 802-04.
36. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 5.7, at 277 (2d ed. 1988).
37. *Id.* § 5.8, at 279-80.
38. *Id.* § 5.4.4, at 260 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
39. *Id.*
40. *Id.* at 261.

performance" or "legitimate needs of the business," the less likely it will be accepted as the actual reason behind the allegedly discriminatory treatment.[41] To the extent that the employer can introduce rebutal evidence sufficient to overcome the presumption that discrimination was the reason, a question of fact is created as to whether the employer's intent was discriminatory or based on a legitimate reason.[42]

Once this question of fact is raised, the employee may surrebut the employer's evidence by focusing on more specific elements of the employer's behavior than she raised in her prima facie case. She may allege that the reason asserted by the employer was merely a pretext to hide the real reason, which was to intentionally discriminate.[43] In doing so, the employee may show that the employer's employment practices and policies conform to a general pattern of discrimination against a protected group.[44]

In *Griggs v. Duke Power Co.*,[45] the U.S. Supreme Court held that once an employee showed a particular employment practice had an adverse impact upon members of a protected class (thereby establishing a prima facie case), the employer had the burden of showing that the employment practice has a "manifest relationship to the employment in question."[46] The Court stated that "[i]f an employment practice that operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited."[47]

In *Wards Cove Packing Co. v. Atonio*,[48] the Supreme Court addressed the allocation of the burden of proof in a disparate impact case.[49] In that case, a group of plaintiffs claimed that several of the employee selection practices had an adverse impact upon their likelihood of being hired or promoted.[50] Although the selection practices used by the employer were facially fair, they had the practical effect of disqualifying a disproportionate number of minority group members. The Court held that an employer carries the burden in a disparate impact case of offering evidence of business necessity for its employment practice.[51]

Under *Wards Cove*, once an employee established a prima facie case of discrimination, the employer merely needed to offer evidence that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."[52] The employer was not required to prove that the challenged practice was "essential" or "indispensable" to

41. *Id.*
42. *Id.* at 261-62.
43. *Id.* § 5.4.5, at 262.
44. *Id.* at 263.
45. 401 U.S. 424 (1971).
46. *Id.* at 432.
47. *Id.* at 431.
48. 490 U.S. 642 (1989).
49. *Id.* at 656.
50. *Id.* at 647-48.
51. *Id.* at 659.
52. *Id.*

the employer's business.[53] Once such evidence was offered, the employee carried the ultimate burden of proving that a challenged practice was either not justified by business necessity or should be considered a pretext for discrimination for some other reason.[54] *Wards Cove* further held that where plaintiffs sought to prove discrimination based upon a disparate impact theory, they must identify the specific employment practice that had the effect of disfavoring them in the selection process.[55]

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991 (CRA).[56] The Act reverses parts of recent Supreme Court decisions, including *Wards Cove*, making it more attractive for employees to bring discrimination suits by providing increased damages and jury trials.[57] The CRA addresses *Wards Cove* in three significant respects. First, the CRA's express purpose is to restore and codify the concepts of "business necessity" and "job relatedness" as used by the Supreme Court in *Griggs* and in other decisions prior to *Wards Cove*.[58] Under the CRA, if the employee is able to establish a prima facie case, the employer in a disparate impact case can prevail only by demonstrating either that the challenged practice does not in fact cause the disparate impact or by proving that the practice is "job related" and justified by "business necessity."[59]

Second, the legislation includes an exception to the *Wards Cove* requirement that plaintiffs must identify the specific employment practice that caused the discrimination.[60] Under the CRA, plaintiffs can treat the entire decision-making process as one employment practice if they demonstrate that the elements of the employer's decision-making process cannot be separated for purposes of analysis.[61] Finally, the CRA reinforces the principle that claims for disparate treatment and claims for disparate impact must be treated as distinct by expressly prohibiting an employer from raising the business necessity defense to a claim for intentional discrimination.[62]

B. *The Pregnancy Discrimination Act*

Prior to 1978, there were mixed views concerning how childbearing or pregnancy discrimination fit into a Title VII analysis. During the early 1970s, federal courts generally interpreted sex discrimination laws broadly to include protection of pregnant women and those with

53. *Id.*
54. *Id.* at 659, 660.
55. *Id.* at 657.
56. Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 1071 [hereinafter Civil Rights Act of 1991].
57. *Id.* at 1072-73.
58. *Id.* at 1071.
59. *Id.* at 1074.
60. *Wards Cove*, 490 U.S. at 657.
61. Civil Rights Act of 1991, *supra* note 56, at 1074.
62. *Id.* at 1075.

childbearing capacity.[63] In 1972, the Equal Employment Opportunity Commission (EEOC) adopted guidelines stating that Title VII prohibited policies disadvantaging women because of pregnancy, childbirth or related medical conditions.[64] Lower courts interpreted these guidelines to mean that pregnancy discrimination constituted sex discrimination, which could only be justified by the BFOQ exception.[65]

Despite the view generally held by the EEOC and the courts, the Supreme Court in *General Electric Co. v. Gilbert*[66] held that discrimination on the basis of pregnancy did not fall within sex discrimination under Title VII.[67] Justice Rehnquist, writing for the Court, reasoned that excluding pregnancy-related disabilities from an employer's disability insurance program had not been shown to have a disparate impact on women.[68] The Court characterized the program as covering all risks shared by men and women and providing an insurance package worth as much to women as to men.[69] The exclusion of pregnancy was merely the elimination of an extra disability unique to women.[70] In response to *Gilbert* and similar other cases, Congress enacted the Pregnancy Discrimination Act (PDA).[71] The PDA amended the definition of sex discrimination under Title VII to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions . . . ."[72]

C. *Application of Title VII and the PDA to Fetal Protection Policies*

Prior to *UAW v. Johnson Controls, Inc.* and since the passage of Title VII, there had been only three reported circuit court cases in which a plaintiff used Title VII as the basis for attacking fetal protection policies.[73] An *amicus* brief filed in *Johnson* noted that these cases "devised

63. *See* Williams, *supra* note 4, at 673-74 n.193 (listing pregnancy discrimination cases prior to the enactment of the Pregnancy Discrimination Act).

64. 29 C.F.R. § 1604.10(a) (1991). The EEOC guidelines state: "A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is a prima facie violation of title VII." *Id.*

65. *See* Williams, *supra* note 4, at 673-74 (identifying decisions during the 1970s as the first phase of pregnancy-based discrimination jurisprudence under Title VII).

66. 429 U.S. 125 (1976).

67. *Id.* at 136.

68. *Id.* at 138.

69. *Id.*

70. *Id.* at 139.

71. 42 U.S.C. § 2000e(k) (1988).

72. *Id.* The PDA provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

Id.

73. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982). A number of early cases were settled, see Williams, *supra* note 4, at 642 n.11. *See also* Doerr v. B.F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio 1979) (early fetal protection case, it was dismissed on jurisdictional grounds). For a case decided following the Seventh Circuit decision in UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir.

convoluted methodologies" in order to treat fetal protection policies as "gender neutral" practices with only an incidental disparate impact on women,[74] thus allowing employers to defend their fetal protection policies by using the business necessity defense.[75]

In *Zuniga v. Kleberg County Hospital*,[76] the plaintiff argued that she had established a prima facie case of sex discrimination by showing that her employer's facially neutral policy of terminating pregnant x-ray technicians burdened women's employment opportunities without affecting those of men. The plaintiff also contended that the hospital had failed to establish a valid business necessity defense for the policy.[77] Zuniga, the first female x-ray technician to be hired at the hospital, was informed that if she became pregnant, she would have to resign or be terminated, and she would not be entitled to maternity leave.[78] She subsequently became pregnant and was told to resign or be fired.[79]

The Fifth Circuit, noting that the PDA did not apply because the termination occurred prior to its effective date,[80] used a benefit/burden analysis in ruling that Zuniga had established a prima facie case of sex discrimination.[81] Next, the court found that the hospital could have utilized an "alternative, less discriminatory means of achieving its business purpose."[82] By examining the hospital's leave of absence policy, the court found that a leave of absence could be granted for, among other things, family health,[83] and to prevent "fetal death, congenital abnormalities, small head, mongolian, or missing organs . . . ."[84] The court thus held that the same reason cited by the hospital for terminating Zuniga could have justified giving her a leave of absence.[85] Because the hospital failed to use a less discriminatory alternative, its business purpose was determined a pretext and the business necessity defense failed.[86] The court declined to consider whether avoidance of tort liability might constitute a business necessity, but acknowledged that "[a]lthough concern over fetal health alone is arguably not the province of the employer, but of the mother" a tort suit brought by a deformed child could be a financial burden, seriously disrupting the safe and effi-

1989), see Grant v. General Motors Corp., 908 F.2d 1303 (6th Cir. 1990) (applying BFOQ standard to fetal protection policies).

74. *See* Brief of the State of California and the California Fair Employment and Housing Commission as Amici Curiae in Support of Petitioners at 4, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (No. 89-1215) [hereinafter Amicus Brief].

75. *Id.*

76. 692 F.2d 986 (5th Cir. 1982).

77. *Id.* at 989. The court did not consider the issue of whether the impact of the hospital's policy was a form of disparate treatment.

78. *Id.* at 988.

79. *Id.*

80. *Id.* at 989 n.6.

81. *Id.* at 991.

82. *Id.* at 992.

83. *Id.* at 992, 993.

84. *Id* at 993.

85. *Id.* at 993-94.

86. *Id.* at 994.

cient operation of the business.[87]

Two weeks after the decision in *Zuniga*, the Fourth Circuit decided *Wright v. Olin Corp.*.[88] *Wright* was the first fetal protection policy case reviewed after the effective date of the PDA. The plaintiffs alleged that Olin's fetal protection policy was a pervasive effort to limit womens' advancement or seniority.[89] The allegations appeared to resemble a "classic case" of covert discrimination under disparate treatment as applied in *McDonnell Douglas Corp. v. Green*,[90] which Olin disputed by contending that the plaintiffs failed to prove disparate treatment as they failed to prove that the business reason—fetal protection—was pretextual.[91]

The plaintiffs went on to argue that *McDonnell Douglas* did not apply. They claimed that their undisputed evidence showed an overt intent to discriminate on the part of Olin because the program had a manifestly adverse effect upon the employment opportunities of women only.[92] The conflict between the parties was whether Olin had the burden of articulating a nondiscriminatory business reason for the fetal protection policy or instead had the burden of proving an affirmative defense by the BFOQ or business necessity.[93]

The Fourth Circuit conceded its difficulty in making the facts of this case fit into a Title VII analysis but concluded that the disparate impact/business necessity analysis was the most appropriate standard to apply.[94] The court ruled that the disparate treatment/BFOQ analysis was inappropriate as it would prevent the employer from asserting a business justification defense that it would otherwise be entitled to assert under Title VII.[95]

There were obvious policy reasons for the court's decision to apply the disparate impact/business necessity analysis. The court justified its decision on the conclusion that the distinction between facial discrimination and disparate impact should not prevent an employer from raising fetal safety as a justification for discriminating on the basis of pregnancy.[96] The court believed the defenses were distinguishable, noting that the business necessity defense was "obviously wider" than the BFOQ defense.[97] The court recognized the social implications of the problem, but noted that any answers are the subject of national policy, which has not been addressed by Congress.[98] This case was the

87. *Id.* at 992 & n.10.
88. 697 F.2d 1172 (4th Cir. 1982).
89. *Id.* at 1179.
90. 411 U.S. 792 (1973).
91. *Id.* at 1183; Amicus Brief, *supra* note 74, at 5.
92. *Wright*, 697 F.2d at 1183.
93. Amicus Brief, *supra* note 74, at 6 & n.3 (stating that after *Wards Cove*, the business defense is no longer an affirmative defense for disparate impact discrimination).
94. *Wright*, 697 F.2d at 1184-85 & n.21.
95. *Id.* at 1185 n.21. The court also rejected the PDA as "conceptually unsound." *Id.* at 1184 n.17.
96. Amicus Brief, *supra* note 74, at 7.
97. *Id.* at 8 (citing *Wright*, 697 F.2d at 1185 n.21).
98. *Wright*, 697 F.2d at 1188.

court's attempt to "divine" congressional intent.[99] Hence, because the BFOQ is such a narrow defense that could not be established here,[100] the court had to look to a broader statutory framework and judicial interpretation.[101]

Two years after *Wright*, the Eleventh Circuit addressed the fetal protection issue in *Hayes v. Shelby Memorial Hospital*.[102] Shelby Memorial Hospital fired Hayes, an x-ray technician, after she advised her supervisor of her pregnancy.[103] The hospital claimed that Hayes was terminated because exposure to ionizing radiation might harm the fetus and because the hospital was unable to find alternative employment for her.[104] Unlike the Fourth Circuit in *Wright*, the Eleventh Circuit recognized that under Title VII, as amended by the PDA, a policy based on pregnancy cannot be deemed neutral.[105] The court initially determined *Hayes* was a facial discrimination case,[106] finding that if an employer cannot overcome the burden of proving that its policy is not facially discriminatory, its only defense is the BFOQ.[107] Therefore, the court held that unless the hospital could show a direct relationship between the policy and a fertile or pregnant woman's actual ability to perform her job, the hospital's defense would fail.[108] The Eleventh Circuit, however, similar to the *Wright* court, looked to the business necessity defense to find a lower standard than that required to prove a BFOQ.[109] It sought to find a way to make the employer's pregnancy-based discrimination a facially neutral policy with an "incidental" disparate impact.[110] The court allowed the hospital to rebut an employer's prima facie case of facial discrimination by proving "that a policy applying only to women or pregnant women employees is justified on a scientific basis and is not necessary to protect the offspring of male employees. . . ."[111] In so proving, the court reasoned, the employer has proven that the policy is neutral in that it protects offspring of all employees.[112] Nevertheless, because the policy has a disproportionate impact on women, even if the employer rebuts the presumption, the employee still has an automatic prima facie case of disparate impact.[113] However, under the disparate impact analysis, the employer has the "wider" business necessity defense.

The court also rejected the hospital's argument that avoidance of

99. *Id.*
100. *Id.* at 1186 n.21.
101. *Id.* at 1188.
102. 726 F.2d 1543 (11th Cir. 1984).
103. *Id.* at 1546.
104. *Id.*
105. *Id.* at 1547.
106. *Id.* at 1547-48.
107. *Id.* at 1549.
108. *Id.*
109. *See* Amicus Brief, *supra* note 74, at 10.
110. *Id.*
111. *Hayes*, 726 F.2d at 1552.
112. *Id.*
113. *Id.*

potential tort liability is a business necessity defense.[114] It stated that potential liability is too contingent and broad to be considered a business necessity.[115] Although an employer could be justified in dismissing an employee for not complying with safety procedures designed to protect the employee or the employee's offspring, the court noted that the focus is on health and safety and not possible litigation.[116]

The circuit courts had stretched to find that fetal protection policies should be analyzed under a disparate impact theory affording employers the "less narrow" business necessity defense. It was at this stage that the U.S. Supreme Court granted certiorari in *UAW v. Johnson Controls, Inc.*[117]

II. INSTANT CASE

A. *Facts*

Johnson Controls, Inc. (Johnson) is a manufacturer of automotive and specialty batteries of which lead is a principle component.[118] Because of the toxicity of lead, Johnson has a comprehensive hygiene program for controlling employees' lead exposure and absorption. Further, in response to the mounting evidence of the significant health risks of exposure to lead, and at the specific urging of its plant physicians and outside medical consultants, Johnson, in 1982, adopted a fetal protection policy designed to protect unborn children and their mothers from the harmful effects of lead exposure.[119] The policy excluded women of childbearing capacity from working in environments in which their blood-lead level could rise above thirty micrograms.[120] It provided that fertile or pregnant women would not be hired for, or be allowed to transfer into, jobs in which the lead exposure was excessive, nor would they be hired for, or be allowed to transfer into, any position from which they could be promoted to a position with excessive exposure to lead.[121] Female employees were required to medically document their inability to have children before they would be considered for these positions.[122] The women removed from their jobs as a result of the policy were transferred to other positions at Johnson without loss of pay or benefits.[123] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers and a group of individual employees (UAW), brought a class

114. *Id.* at 1552-53 n.15.
115. *Id.*
116. *Id.*
117. 111 S. Ct. 1196 (1991).
118. *Id.* at 1199.
119. Johnson adopted the policy after research showed that a woman's exposure to lead can harm a fetus at a lower blood-lead level than that which causes harm in an adult and could injure the fetus even before a woman knows she is pregnant. *Id.* at 1199-1200.
120. UAW v. Johnson Controls, Inc., 886 F.2d 871, 876 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).
121. *Id.* at 877.
122. *Id.* at 876 n.8.
123. *Id.* at 876.

action suit in the United States District Court for the Eastern District of Wisconsin, alleging that Johnson's fetal protection policy violated Title VII by discriminating on the basis of sex.[124]

B. *Lower Court Rulings*

The district court granted summary judgment for Johnson, applying the business necessity test.[125] The Seventh Circuit affirmed en banc the district court's summary judgment in favor of Johnson.[126] The majority directly acknowledged the decisions in *Wright* and *Hayes* holding that the business necessity defense can be appropriately applied to fetal protection policy cases under Title VII.[127] The circuit court concluded that Johnson Controls had shown that a fetal protection policy was a reasonable necessity for industrial safety.[128]

The Seventh Circuit also analyzed the fetal protection policy under the BFOQ defense. Citing *Dothard v. Rawlinson*,[129] the court recognized that in resolving whether a BFOQ was valid depended on the employer reasonably believing that all or substantially all fertile women would be unable to perform the job safely and efficiently.[130] The court concluded that Johnson's policy was supported by a BFOQ defense.[131] With this decision, the Seventh Circuit became the first circuit court to hold that a fetal protection policy could be upheld as a BFOQ.[132]

C. *The Majority*

Justice Blackmun delivered the opinion of the Supreme Court in *UAW v. Johnson Controls, Inc.*,[133] which reversed the Seventh Circuit's decision. The Court concluded that Johnson could not establish that its policy met the BFOQ exception to Title VII.[134] The opinion was based on the plain language of the PDA, which prohibits employers from discriminating against female employees because of their ability to become pregnant.[135] The Court interpreted the PDA as providing that a policy based on pregnancy is facially discriminatory and the employer's only defense is a BFOQ.[136]

The Court began with a departure from the views of *Wright* and *Hayes*. Those courts had reasoned that the challenged fetal protection

124. UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988), *aff'd*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 111 S. Ct. 1196 (1991).
125. *Id.* at 316-17.
126. UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989).
127. *Id.* at 887.
128. *Id.* at 897-98.
129. 433 U.S. 321 (1977).
130. *Johnson*, 886 F.2d at 897.
131. *Id.* at 898.
132. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1202 (1991).
133. 111 S. Ct. 1196 (1991).
134. *Id.* at 1198, 1207.
135. *Id.* at 1198, 1203.
136. *Id.* at 1203-04 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983)).

policies were facially neutral.[137] Employers were therefore allowed to justify their policies under the business necessity defense.[138] The Court established that Johnson's policy was not neutral because it did not apply equally to men and women.[139] Men were allowed to choose whether they wanted to work in a job that was a risk to their reproductive health. The Court also noted that, even though Johnson's policy may not have had a discriminatory intent, that was not sufficient to convert the overtly discriminatory policy into a neutral policy with a discriminatory effect.[140]

The Court supported its finding that Johnson's policy was facially discriminatory by using the language of the PDA to show that, for all Title VII purposes, discrimination because of pregnancy is facial discrimination on the basis of sex.[141] Because Johnson chose to treat all female employees as if they could become pregnant, the Court concluded the policy demonstrated such discrimination.

Next, the Court turned to the issue of whether Johnson should be allowed to discriminate on the basis of sex by proving that its fetal protection policy was a BFOQ. For this purpose, the Court reiterated the restrictive scope of the BFOQ as applied in its prior decisions in *Dothard v. Rawlinson*[142] and *Western Air Lines, Inc. v. Criswell.*[143] Johnson argued that its fetal protection policy fit into the safety exception, a judicially recognized BFOQ.[144] Refusing to expand the safety exception to fetal protection policies, the Court reasoned that neither conceived nor unconceived fetuses can be considered third parties indispensable to the battery manufacturing business.[145] The Court cited Judge Easterbrook's dissenting opinion in the Seventh Circuit's decision in which he observed that it was a play on words to say that "the job" at Johnson to manufacture batteries without risk to the fetus was the same as "the job" at Western Airlines to fly planes without crashing.[146] The Court limited the safety exception to those situations where sex or pregnancy affected the employees' ability to perform their jobs.[147] The Court disposed of the concern for employers' tort liability raised by Justice White in his concurring opinion by stating that, if an employer fully informs the woman of the risks involved in the job, and has not acted negligently, there is but a remote chance that the employer will be held liable.[148] Based on these findings, the Court ruled that Johnson failed to establish a

137. *Id.* at 1203.
138. *Id.*
139. *Id.*
140. *Id.* at 1203-04.
141. *Id.* at 1203.
142. 433 U.S. 321 (1977).
143. 472 U.S. 400 (1985).
144. *Johnson*, 111 S. Ct. at 1205.
145. *Id.* at 1206.
146. UAW v. Johnson Controls, Inc., 111 S. Ct. at 1207 (citing UAW v. Johnson Controls, Inc., 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).
147. *Id.* at 1206.
148. *Id.* at 1208.

BFOQ and therefore its policy violated Title VII as amended by the PDA.

D. *The Concurring Opinions*

There were two concurring opinions in the *Johnson* case. First, in a brief opinion, Justice Scalia elaborated on Judge Easterbrook's view by saying that not only was Johnson prohibited from excluding fertile women from jobs, but that Title VII also gives employees the power to make employment decisions that affect their families.[149] He also addressed the question of whether an employer's compliance under Title VII is required even if it violates state tort law by stating that it is reasonable to believe that Title VII has "accommodated" state tort law through the BFOQ exception.[150]

Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, wrote a separate concurring opinion agreeing with the majority that Johnson's fetal protection policy was facially discriminating and constituted a violation of Title VII unless a BFOQ exception could be proven.[151] Justice White's opinion, however, criticized the majority for reading the BFOQ defense so narrowly that it could never be used to warrant a sex-specific fetal protection policy.[152] According to Justice White, the majority's interpretation of the BFOQ defense meant that even pregnant women could not be prevented from working in areas of high exposure to chemicals toxic to their fetuses.[153]

Justice White argued that avoiding substantial tort liability is a justification for preventing women from working in certain jobs.[154] He also voiced his displeasure with the majority's view that employers have little to fear from liability suits if they inform women of the risk, and if the employer has not acted negligently. He found this to be of little comfort to employers, since: (1) it is not clear whether Title VII preempts state tort liability; and (2) even though employers may avoid claims brought by employees, they cannot escape the claims brought by injured children.[155] Justice White considered the general rule that parents cannot waive their children's rights to sue because of the parents' own negligence.[156] Every state currently allows children born alive to sue in tort for prenatal injuries caused by the negligence of third parties.[157] Furthermore, an increasing number of jurisdictions have allowed recovery for torts causing prenatal injuries prior to conception.[158]

In his opinion, Justice White argued that the majority's limiting of

149. *Id.* at 1216 (Scalia, J., concurring).
150. *Id.*
151. *Id.* at 1210 (White, J., concurring).
152. *Id.*
153. *Id.* at 1214.
154. *Id.* at 1210.
155. *Id.* at 1211.
156. *Id.* at 1211.
157. *Id.* at 1210-11.
158. *Id.*

the safety exception to those situations where sex or pregnancy affected the employees' ability to perform their jobs did not support its conclusion that a fetal protection policy could not be justified as a BFOQ.[159] Justice White asserted that *Dothard* and *Criswell* made it clear that avoiding substantial safety risks to third parties was not only an inherent part of an employee's ability to perform a job, but also an inherent part of the usual operations of an employer's business.[160] He pointed out that protecting fetuses while performing the duties of battery manufacturing was as legitimate a concern as was the safety of prison inmates or airline passengers.[161] Furthermore, Justice White noted that the legislative history of Title VII gives examples of permissible sex discrimination, and in none of those situations did sex interfere with the employee's ability to perform the job.[162] Disagreeing with the majority's claim that the PDA restricted the use of the BFOQ defense, Justice White contended that Congress did not intend for the PDA to alter an employer's defenses under Title VII. Congress intended to redefine sex discrimination to include pregnancy and childbirth but not to change, in any other way, how Title VII is applied to sex discrimination.[163]

Although he disagreed with the majority's narrow application of the BFOQ defense, Justice White concluded that Johnson's fetal protection policy reached too far in excluding all fertile women, regardless of age, and in excluding women from jobs that might advance into positions in which the duties require high quantities of lead exposure.[164] He also agreed that Johnson had not shown that its policy was reasonably necessary to its usual business operations, as Johnson had incurred no increase in fetal risk or associated costs since the implementation of its fetal protection policy in 1982.[165]

III. Analysis

The majority opinion in *Johnson* concluded that sex-specific fetal protection policies are not legal under Title VII unless the safety of third parties is related to job performance and is relevant to an employee's ability to perform the assigned tasks. This decision has the effect of saying that under Title VII, employers are allowed to consider only production-related concerns and are prohibited from recognizing external societal/moral judgments in determining how businesses should operate. The opinion is inconsistent with relevant precedents, statutory language and the legislative history. It also exhibits a total disregard for the employer's legal duty and society's interest in the health of its members. Protecting third parties, including fetuses, from serious health and

159. *Id.* at 1213.
160. *Id.*
161. *Id.*
162. *Id.* at 1214 n.8. The examples were a female nurse hired to care for an elderly woman, an all-male baseball team, a masseur and a washroom attendant. *Id.*
163. *Id.* at 1214.
164. *Id.* at 1215.
165. *Id.*

safety risks arising directly out of the manufacturing process is reasonably necessary to a responsible employer's normal operation and thus can constitute a BFOQ in narrow circumstances.

A. *Relevant Precedents, Statutory Language and Legislative History*

Each circuit court considering the issue prior to *Johnson* has struggled with the limits on the BFOQ as a defense to facially discriminatory fetal protection policies. In *Wright*, the court was admittedly attempting to find the "probable" congressional intent in the absence of specific congressional expression regarding fetal protection policies.[166] In order to find those answers, the court had to devise a way to instead apply a business necessity defense, providing more latitude to explore the conflict between fetal safety and sex discrimination. In *Hayes*, although the court acknowledged the presumption that the fetal protection policy was facially discriminatory and ruled that the district court's findings of fact were sufficient to support a holding of facial discrimination, it allowed the employer to rebut the presumption of a disparate impact in order to be "completely fair" to the employer.[167] Thus, it was clear from these cases that the courts were reaching for a reasonable solution to fetal protection policies.

The Supreme Court in *Johnson* rejected the precedent set by the circuit courts and essentially disposed of the disparate impact analysis and business necessity defense for fetal protection policies, leaving only a BFOQ defense, which the court applies only under the most extreme circumstances. The majority in *Johnson* also pointed to its decisions in *Dothard* and *Criswell* to support its restrictive interpretation of the safety exception as a BFOQ. As Justice White indicated in his concurring opinion, protecting fetal safety while performing the duties of battery manufacturing is as legitimate a concern as is the safety of prison inmates and airline passengers.[168] In the Seventh Circuit's decision in *Johnson*, the court acknowledged that the safety exception in *Dothard* was extremely limited because more was at stake than a woman's decision to accept the risks of employment in a maximum security male prison.[169] However, the court felt that there was similarly more at stake than a woman's decision to work in a high lead exposure such as the "intellectual and physical development" of her unborn child.[170] The Seventh Circuit feared that a female employee could somehow "rationally discount" the ultimate risk, believing that her baby would not be harmed from lead exposure.[171] Therefore, the court held that since "more is at stake" than the woman's right to make an employment decision, *Dothard* served as support for the conclusion that a fetal protection policy consti-

166. Wright v. Olin Corp., 697 F.2d 1172, 1189 (4th Cir. 1982).
167. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984).
168. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1213 (1991) (White, J., concurring).
169. UAW v. Johnson Controls, Inc., 886 F.2d 871, 897 (7th Cir. 1989).
170. *Id.*
171. *Id.*

tuted a BFOQ.[172]

The Supreme Court's majority decision also found that the PDA established a BFOQ standard that all pregnant employees must be treated the same as other employees unless they differ in their ability or inability to perform the required work.[173] As Justice White argued, the PDA simply amended the definition of sex under Title VII without eliminating or altering the BFOQ defense.[174] The PDA merely clarified Title VII to make it clear that pregnancy was included in the protection provided under Title VII's antidiscrimination provisions.[175] The legislative history of the PDA described pregnancy and related conditions as part of the definition of sex under Title VII, but "it does not change the application of Title VII to sex discrimination in any other way."[176] The House report also stated that the "pregnancy-based" distinctions would be applied the same way as other proscribed acts of sex discrimination.[177] Furthermore, the majority failed to offer any explanation of why Congress might have intended a measure, designed in part to protect fetal health, to be construed as requiring an employer to expose the unborn child to toxic hazards known to cause irreparable brain damage.[178] As the Supreme Court counseled in *Price Waterhouse v. Hopkins*, "[w]e need not leave our common sense at the doorstep when we interpret a statute."[179]

B. *Employer's Legal Duty*

Johnson has a legal duty to avoid injuries to the unborn child that result directly from the toxic hazards of Johnson's own manufacturing operations. The majority acknowledged that over forty states now recognize a right to recover for prenatal injuries based either on negligence or wrongful death.[180] What the majority failed to acknowledge is that the child itself, if born alive, is now permitted in every jurisdiction to bring an action for the consequences of prenatal injuries.[181] There are also a small number of courts that have allowed a cause of action for recovery by children who have not yet even been conceived when the harmful contact with the mother occurs.[182] Contrary to the majority's suggestion that an employer might discharge this duty simply by cau-

172. *Id.* at 898.
173. *Johnson*, 111 S. Ct. at 1206.
174. *Id.* at 1213 (White, J., concurring).
175. *Id.*
176. *Id.* at 1214 (quoting S. REP. No. 331, 95th Cong., 1st Sess. at 3-4 (1977))(emphasis omitted).
177. *Id.* (citing H.R. REP. No. 948, 95th Cong., 2d Sess. at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4752).
178. Brief for Respondent at 34, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (No. 89-1215).
179. *Id.*
180. *Johnson*, 111 S. Ct. at 1208.
181. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55 at 368 (5th ed. 1984).
182. *Id.* at 369 & nn.24-26.

tioning its employees about the risks and leaving the choice to the employee, the employer's duty runs directly to the fetus or potential fetus.

It is difficult to estimate Johnson's exposure to tort liability. However, given today's litigious society, it is an important consideration.[183] As an example, it was mass tort suits that drove the asbestos industry into bankruptcy.[184] For Johnson and other similarly situated companies, compensatory and punitive damages awarded in tort suits brought by lead-poisoned children could easily put them out of business. This decision makes that possibility more of a reality.

C. *Society's Interest in the Health of its Members*

Whether society's interest is characterized as fulfilling reasonably perceived legal duties or simply as promoting the overriding interest in the health and safety of children, properly implemented fetal protection policies serve a greater public good than merely protecting employers from lawsuits.[185] Society has an unquestionable interest in the health of its members, including children.[186] An employer's adoption of policies protective of the health of its employees and their families, consumers or persons living near its facility is a social good that should be encouraged. As the country becomes increasingly burdened by industry's hazardous products, by-products and wastes, the government has increased its requirement, at a substantial expense to industry, that health—fetal health included—become a corporate concern.[187]

It seems easy to understand how Johnson's policy could be construed as the offensive intrusion of "reproductive police" into the workplace.[188] The majority's holding in *Johnson* may be read to support that view by finding that fetal protection policies violate Title VII by not allowing women to freely choose whether or not to work around fetal toxics.[189] The wrong choice, however, may create cause for public concern. For example, at least one out of eight women who had children while working in high-lead environments gave birth to a child suffering from lead poisoning.[190] Families with lead-poisoned children may be required to turn to a "deep pocket" such as government or industry for help.[191] Just as babies of cocaine addicts require hundreds of thousands of dollars to survive, lead-poisoned children with irreversible mental retardation require expensive care and frequently institutionalization at taxpayer or corporate expense.[192]

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183. *Id.* at 905.
184. *Id.*
185. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553 n.15 (11th Cir. 1984).
186. *See* Williams, *supra* note 4, at 645.
187. *Id.*
188. Arlynn L. Presser, *Should "Fetal Protection" Policies Be Upheld? Yes: For Risky Businesses*, A.B.A. J., June 1990 at 38.
189. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1209-10 (1991).
190. *See* Presser, *supra* note 188.
191. *Id.*
192. *Id.*

CONCLUSION

In *Johnson*, the United States Supreme Court missed an opportunity to modernize Title VII by broadening the BFOQ defense into a tool for balancing rights and, in the instant case, by balancing sexual equality in the workplace against threats to the health and safety of unborn or unconceived children from toxic manufacturing operations. If fetal protection policies are strictly prohibited, as analyzed under this Court's version of a BFOQ standard, many companies will have to abandon these policies or go out of business as a result of substantial tort liability. Clearly, companies will have no defense for Title VII allegations under this restrictive interpretation of the BFOQ because they will not be able to prove that the women excluded cannot perform the physical tasks of their jobs.

Further, this decision equates an employer's efforts to honor its perceived legal obligation with a concern merely for the balance sheet. The fairness of forcing an employer knowingly to expose a fetus to its hazardous substances and processes and then be required to compensate for the consequences should be examined. The consequences of a tort suit could be financially devastating, seriously disrupting the safe and efficient operations of the business.[193]

Finally, this decision, if carried out, will create a risk to society. If and when a business discontinues operations, for whatever reason, the burden will be shifted to society to establish programs to train and maintain handicapped children or to teach children to cope with the mental and physical injuries which could result from lead exposure or other fetal-toxic hazards in the workplace.

Shirley A. Levy

193. *See* Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 n.10 (5th Cir. 1982).